(1)

Supreme Court, U.S.
FILED

99 426 SEP 13 1999

OFFICE OF THE CLERK

Docket Number _____

In The

SUPREME COURT OF THE UNITED STATES

FRANK PAUL LUKACS,

Petitioner,

v.

HONORABLE DONNA E. SHALALA, ET AL,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825
Petitioner Pro Se

B13 PP

QUESTIONS PRESENTED FOR REVIEW

I. Under strict scrutiny, are the racial and gender and national origin classifications of the United States federal government's affirmative action and diversity programs for minorities and females and hispanics narrowly tailored measures that further compelling governmental interests, as per *Adarand*?

II. "May" "such a benefit" as 29 C.F.R. §1614 processing and investigation of EEO complaints "that is part and parcel of the employment relationship be doled out in a discriminatory fashion" under Title VII as per *Hishon*?

III. "May" "an employee or applicant for employment file a civil action" "within 90 days of receipt of notice of final action taken by an agency, department, or EEOC"?

IV. May a party file and have considered, motions for consolidation "when actions involving a common question of law or fact are pending before the court" as per FRCP Rule 42?

V. Is the pendency of an earlier action grounds for the sua sponte dismissal of a subsequent action, or should these actions with "common questions of law or fact pending before the court" instead be consolidated?

VI. "May" "a party amend the party's pleading once as a matter of course at any time before a responsive pleading is served" FRCP Rule 15?

VII. Is it an abuse of discretion for a district court to refuse to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP or Title VII?

LIST OF ALL PARTIES TO THE PROCEEDING

No. 98-2621

FRANK PAUL LUKACS,

Plaintiff - Appellant,

versus

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES; HAROLD E. VARMUS, Doctor, Director, National Institutes of Health; RICHARD KLAUSNER, Doctor, Director, National Cancer Institute; BEVERLY LOTT WYATT, Chief, Research Contracts Branch, National Cancer Institute; DAVID SNIGHT, Chief, Research Contracts Branch, Division of Contracts and Grants, OA, OD, National Institutes of Health; PHILIP AMORUSO, Executive Director, National Cancer Institute; MAXINE RICHARDSON, Equal Opportunity Manager, National Cancer Institute; MARIANNE WAGNER, Personnel Officer, National Cancer Institute; DIANE ARMSTRONG, Director Equal Employment Opportunity, National Institutes of Health; JAMES KING, Director, Office of Personnel Management; SANDRA THOMAS, Equal Employment Opportunity Manager, National Cancer Institute,

Defendants - Appellees.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

CITATIONS OF THE REPORTS 1

BASIS FOR JURISDICTION 1

CONSTITUTION, STATUTES, REGULATIONS 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT 3

I. FRCP RULE 65 INJUNCTIONS 3

Under strict scrutiny, are the racial and gender and national origin classifications of the United States federal government's affirmative action and diversity programs for minorities and females and hispanics narrowly tailored measures that further compelling governmental interests, (as per *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523)?

II. FRCP RULE 56 SUMMARY JUDGMENT
29 C.F.R. § 1614 INVESTIGATIONS ... 14

"Is" "the agency required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint", to quote the words of 29 C.F.R. § 1614, federal sector equal employment opportunity, and "may" "such a benefit qualify as a "privilege" of employment under Title VII", and "may" "such a benefit" "that is part and parcel of the employment relationship ... be doled out in a discriminatory fashion" to quote the words of *Hishon v. King & Spalding*, 467 U.S. 69, at 75-76 (1984)?

III. RIGHT TO FILE A CIVIL ACTION 16

"May" "an employee or applicant for employment file a civil action" "within 90 days of receipt of notice of final action taken by a department, agency, or by the Equal Employment Opportunity Commission", to quote 42 USC § 2000e-16 (Title VII)?

Does a continuing series of wrongful acts resulting in ongoing damage permit a series of actions, with each such action considered to be a separate claim, unrestricted by the limitation of the claim preclusion doctrine, as per *Zenith Radio Corp.*?

V. FRCP RULE 42 CONSOLIDATION 20

May a party file, have docketed, and have seriously considered, motions for consolidation "when actions involving a common question of law or fact are pending before the court", to quote FRCP Rule 42?

Is the pendency of an earlier action in the same federal district court a ground for the sua sponte dismissal, without any much less a reasonable opportunity to be heard, of a subsequently instituted action that is based on a different cause of action than that in the pending action against the same defendants, or is the proper solution if there are "common questions of law or fact pending before the court" to consolidate the actions?

VI. FRCP RULE 15 AMENDED PLEADINGS 21

"May" "a party amend the party's pleading once as a matter of course at any time before a responsive pleading is served", to quote Federal Rules of Civil Procedure Rule 15?

VI. FRCP RULE 55 JUDGMENT BY DEFAULT .. 23

Is it fair that the United States government can repeatedly purposefully "fail to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise" with impunity?

VI. MOTIONS, PLEADINGS, AFFIDAVITS, APPEALS AUTHORIZED BY THE FRCP AND TITLE VII 25

Is it an abuse of discretion for a district court to order plaintiff to file no further pleadings or motions or affidavits or appeals authorized by the FRCP or Title VII, or to dismiss and refuse to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP or Title VII, including "amend[ing] the party's pleading once as a matter of course at any time before a responsive pleading is served", or motions to "amend the party's pleading by leave of court ... which shall be freely given when justice so requires", or motions for consolidation in "actions involving a common question of law or fact pending before the court", or motions for a preliminary or a permanent injunction on the racial and gender and national origin classifications of the United States federal government's so called affirmative action and diversity programs?

CONCLUSION 29

APPENDIX A A1
APPENDIX B B1
APPENDIX C C1
APPENDIX D D1
APPENDIX E E1
APPENDIX F F1
APPENDIX G G1
APPENDIX H H1
APPENDIX I I1
APPENDIX J J1
APPENDIX K K1
APPENDIX L L1
APPENDIX M M1
APPENDIX N N1
APPENDIX O O1
APPENDIX P P1
APPENDIX Q Q1
APPENDIX R R1
APPENDIX S S1
APPENDIX T T1
APPENDIX U U1
APPENDIX V V1
APPENDIX W W1
APPENDIX X X1
APPENDIX Y Y1
APPENDIX Z Z1

APPENDIX AA AA1
APPENDIX BB BB1
APPENDIX CC CC1
APPENDIX DD DD1
APPENDIX EE EE1
APPENDIX FF FF1
APPENDIX GG GG1
APPENDIX HH HH1
APPENDIX II II1
APPENDIX JJ JJ1
APPENDIX KK KK1
APPENDIX LL LL1
APPENDIX MM MM1
APPENDIX NN NN1
APPENDIX OO OO1
APPENDIX PP PP1
APPENDIX QQ QQ1
APPENDIX RR RR1
APPENDIX SS SS1
APPENDIX TT TT1
APPENDIX UU UU1
APPENDIX VV VV1
APPENDIX WW WW1
APPENDIX XX XX1

TABLE OF CITED AUTHORITIES

Case Citations ..... Page Number

Abdullah v. Gatto, 773 F.2d 487, at 488 (2d Cir. 1985) (per curiam) 29

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523) 4, 13, 14, 29

Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct. 1491, 1994, 52 L.Ed. 2d 72 (1977) 28

Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971) 16

City of Richmond v. J.A. Croson Company, 488 U.S. at 501-502, 109 S.Ct. at 725-726 ..... 5, 10, 13

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962) 22, 23

Fullilove", 96 Yale L.J. 453, at 482 ... 12

General Contractors v. Jacksonville, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993) 13

Hazelwood School District v. United States, 433 U.S. at 308, n. 13, 97 S.Ct. at 2742 n. 13 10

Hishon v. King & Spalding, 467 U.S. 69, at 75-76 (1984) 14, 16

In re Green, 669 F. 2d 779, at 786, (D.C.Cir. 1981) (per curiam) 29

In re Halliburton Co., 991 F.2d 810, 1993 WL 118929, (Fed.Cir.(Tex.), March 12, 1993) 28

In re Martin-Trigona, 737 F.2d 1254, 1261-1262 (2d Cir. 1984) 28

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 651-652, 107 S.Ct. 1442, 1462, 94 L.Ed.2d 615 (1987) 10

Johl v. Johl, 788 F.2d 75 (2d Cir. 1986) 28

Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc., 831 F.2d 77 (5th Cir. 1987) 23

MacDraw, Inc. v. CIT Group Equipment Financing, Inc., 73 F.3d 1253, 1256 (2nd Cir.(N.Y.) 1996) 28

Milltex Industries Corp. v. Jacquard Lace Co., Ltd., 55 F.3d 34, at 39 (2nd Cir.(N.Y.) 1995) 28

Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 102 ... 28

Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings 23

3 Moore's Federal Practice, § 15.15 [1] (Matthew Bender 3d ed.) 23

8 Moore's Federal Practice, § 42.10 [1] [a] (Matthew Bender 3d ed. 1997) 21

18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled "Continuing Wrongful Conduct by Defendant" 20

Moy v. United States, 906 F. 2d 467, 470 (9th Cir. 1990) 28

Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892) 21

Procup v. Strickland, 792 F.2d 1069, at 1078 (11th Cir. 1986) (en banc, per curiam) 29

Richardson Greenshields Securities Inc. v. Lau, 825 F.2d 647, at 652 (2d Cir. 1987) 28

Schoenberg v. Shaposlky Publishers, Inc., 971 F.2d 926, 936 (2nd Cir.(N.Y.) 1992) 28

Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir. 1991) 23

Wygant v. Jackson Board of Education, 476 U.S., at 284, n. 13, 106 S.Ct. at 1852 n. 13 12

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) 17, 20

Fifth Amendment Due Process Clause of the United States Constitution 1, 2, D1

Fourteenth Amendment Equal Protection Clause of the United States Constitution . 1, 2, D1

42 U.S.C. §2000e-16, et seq. under Title VII of the Civil Rights Act of 1964 .... 2, 16, 17, 18, 19, 25, 29, D2, M1

42 U.S.C. §2000e-2, et seq. under Title VII of the Civil Rights Act of 1964 ... 2, D12, M1

5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d) 2, D3, M1

5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c) 2, D4, M1

29 C.F.R. § 1614.408 Civil action: Title VII, Age Discrimination in Employment Act, and Rehabilitation Act ... 2, 17, 18, 19, D6, M4

29 C.F.R. 1614.108 Investigation of Complaints 2, 3, 14, 15, D9, M4

Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM) 2, 5, 7, 8, 11, D6, M2

Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA) 2, 9, D8, M6

Federal Rules of Civil Procedure Rule 15. Amended and Supplemental Pleadings ... 2, 21

Federal Rules of Civil Procedure Rule 42. Consolidation; Separate Trials 2, 20

CITATIONS OF THE REPORTS

The Order of the United States District Court, District of Maryland, dated October 13, 1998, filed on October 19, 1998, and entered on October 21, 1998 in PJM-96-2913 is attached as Appendix A.

Petitioner appeals from the Fourth Circuit Court of Appeals (USCAFC) judgment in Frank Paul Lukacs, Plaintiff-Appellant, versus Donna E. Shalala, Secretary of Health and Human Services, et. al. Defendants-Appellees, USCAFC Case Number 98-2621 (CA-96-2913-PJM), entered on April 07, 1999 (Appendix B).

Petitioner's Petition for Rehearing and Petition for Rehearing In Banc in USCAFC Case Number 98-2621 (CA-96-2913-PJM) was denied by the USCAFC on June 14, 1999 (Appendix C).

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 1651. Since a review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance was initially stated as "Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 and §1343. Authority for this Complaint is provided in the Fourteenth Amendment Equal Protection Clause of the United States Constitution, by the Fifth Amendment Due Process Clause of the United States Constitution, by 42 U.S.C. §2000e, et. seq. under Title VII of the Civil

Rights Act of 1964, and under 29 U.S.C. §621 et. seq."

CONSTITUTION, STATUTES, REGULATIONS

The citations of the relevant Constitutional provisions, statutes, and regulations involved in the case follow, with their pertinent text set out verbatim in the appendix (Appendix D): Fourteenth Amendment Equal Protection Clause of the United States Constitution; Fifth Amendment Due Process Clause of the United States Constitution; 42 U.S.C. §2000e-16, et seq. under Title VII of the Civil Rights Act of 1964; 42 U.S.C. §2000e-2 Unlawful Employment Practices; 42 U.S.C. §2000e-2, et seq. under Title VII of the Civil Rights Act of 1964; 5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d); 5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c); 29 C.F.R. § 1614.408 Civil action: Title VII, Age Discrimination in Employment Act, and Rehabilitation Act; 29 C.F.R. 1614.108 Investigation of Complaints; Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM); Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA); Federal Rules of Civil Procedure Rule 15, Amended and Supplemental Pleadings; Federal Rules of Civil Procedure Rule 42, Consolidation, Separate Trials.

STATEMENT OF THE CASE

Petitioner from the date of his first Equal Employment Opportunity (EEO) complaint at the National Institutes of Health (NIH) in January of 1991, despite his having applied on an average of about once every month for advertised job vacancy announcements and benefits, and having timely filed over sixty different, separate, and distinct individual EEO complaints "within 45 days of the date of the matter alleged to be discriminatory" as per 29 C.F.R. § 1614, on about fifty of which EEO complaints there was never any of the 29 C.F.R. § 1614 mandatory processing and independent investigation by the agency, (See Appendix D) has never once in all this time ever been selected for a so called affirmative action designated or diversity designated or Federal Equal Opportunity Recruitment Program (FEORP) designated or Affirmative Employment Program (AEP) designated job opening or benefit, which are in effect set aside for minorities and women and hispanics, at the NIH, at DHHS, or anywhere else in the entire United States federal government.

REASONS FOR ALLOWANCE OF THE WRIT

I. FRCP RULE 65 INJUNCTIONS

Under strict scrutiny, are the racial and gender and national origin classifications of the United States federal government's affirmative action and diversity programs for minorities and females and hispanics narrowly

tailored measures that further compelling governmental interests, (as per *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523)?

Petitioner filed motions and memorandum in support of the motions for a preliminary injunction or for a permanent injunction on the finding and conclusion that no compelling governmental interest exists which constitutionally protects or permits continuation of the US federal government's or NIH's affirmative action programs or diversity programs or the Federal Equal Opportunity Recruitment Program (FEORP) or the Affirmative Employment Program (AEP) and that the means employed by the US federal government's or NIH's affirmative action programs or diversity programs or the Federal Equal Opportunity Recruitment Program (FEORP) or the Affirmative Employment Program (AEP) are not narrowly tailored measures according to *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 at 2144, 132 L.Ed.2d 158, 63 USLW 4523, (U.S.Colo., Jun 12, 1995) (See Appendix J, K, HH, and II).

The reality of the matter is that there are simply too many individual elements which comprise the United States so called affirmative action programs for minorities and women and hispanics and diversity programs and FEORP and AEP to be able to even summarily list them all in these thirty pages. For a brief mention of some of these elements please

see Appendix D, E, J, K, HH, and II. Thus petitioner will merely mention two aspects of the broad United States federal government's affirmative action program which the US Supreme Court has already definitively decided to be unconstitutional on a more limited local governmental level in *Croson*.

The United States Office of Personnel Management regulations state: **"An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex in a category of Federal employment and (b) the percentage of that same group in the civilian labor force either nationally or locally."** (See Attachment 1 to FPM Letter 720-2.) Furthermore, "agencies need to compare both national and local", (State or standard metropolitan statistical area ("SMSA)), "civilian labor force data for each minority/sex group, and under OPM's regulations, must generally use the higher of the two percentages in making each underrepresentation determination". Id.

Although plaintiff maintains that there should be no mandatory FEORP and no mandatory AEP at all, for they are merely thinly disguised quotas, in the alternative, plaintiff submits that a more appropriate comparison might be the percentage of a particular minority/sex group in a category of Federal government employment versus the percentage of that same minority/sex group in the same category of employment in the

civilian labor force. The distinction in plain terms for example is that the percentage of minority/women contract specialists in DHHS should be compared to the percentage of minority/women contract specialists in the civilian labor force, and not merely to the percentage of minority/women in the civilian labor force.

This obviously makes a big difference into whether or not there is even any so called underrepresentation when one considers the facts and reality. Black males are only 3.64% of the GS-1102 contract specialist area civilian labor force, but are 9.9% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, black males are actually overrepresented by a factor of three to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. Similarly black females are only 3.13% of the GS-1102 contract specialist area civilian labor force, but are 14.4% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, black females are actually overrepresented by a factor of over three to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. White females are 26.57% of the GS-1102 contract specialist area civilian labor force, but are 44.2% of the GS-1102 contract

specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, white females are actually overrepresented by a factor of almost five to three in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. White males are 60.44% of the GS-1102 contract specialist area civilian labor force, but are only 28.1% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, white males are actually underrepresented by a factor of two to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. Thus although 60.44% of the selections made in the agency should be white males, because of the discrimination of affirmative action for minorities and females and the negative action against white males, in a typical year only 14% of the selections made in the agency are white males.

To substantiate the allegation that the present OPM Attachment 1 to FPM Letter 720-2 comparison is meaningless and discriminatory, Plaintiff submits the OPM guidelines themselves which specifically state that: **"It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor data without regard to the availability of minorities and women in the labor force identified as having**

(or potentially having) the skills needed to perform in various occupations and pay grades". See FPM Letter 720-2.

Furthermore, 5 C.F.R. §720.202 (e) itself states that: "**Recruitment** means the total process by which the Federal Government and the Federal agencies locate, identify, **and assist in the employment** of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It **is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through programs of training, work experience, or both.**"

Thus recruitment, through an inappropriate redefinition of the very word recruitment, now includes the total process of every conceivable assistance and preference and favoritism to the selection and employment of minorities and women, with no foreseeable limitations or boundaries, and in effect has moved from its supposedly harmless temporary remedy basis of justification to a very harmful and discriminatory permanent system of hiring and promoting minorities and women at the direct expense of old white males. Thus affirmative action for minorities and women

has become negative action against white males.

Thus there are special affirmative action programs for totally unqualified minorities and women such as the Career Opportunity Training Agreement (COTA), upward mobility, Stride, and management intern programs. In particular COTA has a self described recruiting and selection method which states that: **"Selection Method: Through the use of the Department of Health and Human Services Training Agreement for Career Opportunities, employees who do not meet the basic qualification requirements, as stated in the X-118 Qualification Standards, will be given the opportunity to be competitively selected for the above position."**

Thus through COTA minorities and women who do not meet even the minimum basic qualification requirements, as is specifically published in the OPM book entitled X-118 Qualification Standards, by so called competition restricted to those minorities and women who are totally unqualified, must nevertheless be hired over Plaintiff, or euphemistically given the opportunity to be selected as so called "trainees", must receive priority training over Plaintiff, and must be promoted over Plaintiff. Plaintiff as a highly qualified old white male is harmed by the discriminatory hiring, training, and promotion of such totally unqualified minority and female "trainees".

"When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. *Hazelwood School District v. United States*, 433 U.S. at 308, n. 13, 97 S.Ct. at 2742 n. 13." (*City of Richmond v. J.A. Croson Company*, 488 U.S. at 501-502, 109 S.Ct. at 725-726.)

"Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood School District v. United States*, 433 U.S. at 308, 97 S.Ct. at 2741; *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 651-652, 107 S.Ct. 1442, 1462, 94 L.Ed.2d 615 (1987)." (*City of Richmond v. J.A. Croson Company*, 488 U.S. at 501-502, 109 S.Ct. at 725-726.)

OPM guidelines define minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of Europe. See Attachment 1 to FPM Letter 720-2.

Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows: "(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. (b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that: "in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language". The FPM Letter provides no basis for its varying definition of Hispanic origin within the 50 states.

"To accept Richmond's claim that past

societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ... There is absolutely no evidence of past discrimination against Spanish speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. ... The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination. ... The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant v. Jackson Board of Education*, 476 U.S., at 284, n. 13, 106 S.Ct. at 1852 n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days, "*Fullilove*", 96 Yale L.J. 453, at 482 ("Such programs leave one with the sense that racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination")." (*City of*

Richmond v. J. A. Croson Company, 488 U.S. at 506-507, 109 S.Ct. at 728-729.)

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal footing." *General Contractors v. Jacksonville*, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., at ---, 113 S.Ct., at 2303. *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2104-2106. ... Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2110-2112. ... Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if

they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114.

II. FRCP RULE 56 SUMMARY JUDGMENT
29 C.F.R. § 1614 INVESTIGATION OF COMPLAINTS

"Is" "the agency required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint", to quote the words of 29 C.F.R. § 1614, federal sector equal employment opportunity, and "may" "such a benefit qualify as a "privilege" of employment under Title VII", and "may" "such a benefit" "that is part and parcel of the employment relationship ... be doled out in a discriminatory fashion" to quote the words of *Hishon v. King & Spalding*, 467 U.S. 69, at 75-76 (1984)?

An important element of the US federal government's affirmative action and diversity programs for minorities and females and hispanics against which petitioner sought a preliminary injunction or a permanent injunction or in the alternative partial summary judgment is that the same minorities, females, and hispanics who are delegated the responsibility to create, maintain, and perpetuate these discriminatory programs against white males are also the same minorities, females, and hispanics delegated the responsibility to process and investigate Equal Employment Opportunity (EEO) complaints

by white males against such affirmative action and diversity programs. To make a long story short, the end result obviously is that the mandatory processing and investigation of fifty of this white male petitioner's EEO complaints against various elements of affirmative action and diversity have never even been started for the last eight years now, much less having been completed within the mandatory 180 days, **while at the same time other EEO complaints during those same eight years were being actively and aggressively processed and actively and aggressively investigated simply because these EEO complaints were from minorities or females or hispanics**.

In each of petitioner's civil actions, petitioner filed motions and memorandum in support of the motions for the district court to impose the 29 C.F.R. § 1614 sanctions against defendants for defendants purposeful violation of 29 C.F.R. § 1614 regarding defendants failure to process or independently investigate fifty of petitioner's EEO complaints (See Appendix D, E, F, G, H, I).

"Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term, condition, or privilege of employment. An employer may provide its employees with many benefits that it is under no obligation to

furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), [FN7] or that form "an aspect of the relationship between the employer and employees," *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971), [FN8] may not be afforded in a manner contrary to Title VII." *Hishon v. King & Spalding*, 467 U.S. 69, at 75-76 (1984).

III. RIGHT TO FILE A CIVIL ACTION

"May" "an employee or applicant for employment file a civil action" "within 90 days of receipt of notice of final action taken by a department, agency, or by the Equal Employment Opportunity Commission", to quote the words of 42 USC § 2000e-16 (Title VII)?

Does a continuing series of wrongful acts resulting in ongoing damage permit a series of actions, with each such action considered to be a separate claim, unrestricted by the limitation of the claim preclusion doctrine,

as per *Zenith Radio Corp.*?

According 29 C.F.R. § 1614 for each transaction or factual allegation or **"matter alleged to be discriminatory"**, to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a different, separate, and distinct Equal Employment Opportunity (EEO) complaint **"within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action"**, (See Appendix D), and thus in effect each different, separate, and distinct EEO complaint within 45 days of the date of the "matter alleged to be discriminatory" is a different, separate, and distinct transaction and a different, separate, and distinct factual allegation for purposes of claim analysis.

To meet the deadlines imposed by 42 U.S.C. 2000e et seq. (Title VII) (See Appendix D) and 29 C.F.R. § 1614 (See Appendix D) **"to file a civil action in an appropriate United States District Court" "Within 90 days of receipt of the final decision"**, as the final decisions were being rendered by the agency (NIH), the department (DHHS), and the Equal Employment Opportunity Commission (EEOC) on Petitioner's five dozen different, separate, and distinct individual EEO complaints subsequent to the filing date of 09/17/96 of the initial pleading in PJM-96-2913,

Petitioner filed four additional civil actions, PJM-97-379, PJM-97-3359, PJM-97-3483, and PJM-97-3495. For a simplified version of the relevant dates involved in the filing of the EEO complaints and the Final Agency Decisions (FAD) and the federal court civil actions, please see Appendix Y, which contains quotations from a sample memorandum in support of petitioner's motion for consolidation which was filed and docketed in all five of the civil actions, or Appendix VV, which contains quotations from petitioner's informal brief at the USCAFC. In addition, petitioner has also reproduced some of the many final agency decisions, final department decisions, and final EEOC decisions specifically instructing and specifically directing petitioner **"to file a civil action in an appropriate United States District Court" "Within 90 days of receipt of the final decision"** as per 42 U.S.C. 2000e et seq. (Title VII) (See Appendix D) and 29 C.F.R. § 1614 (See Appendix D). A sample quotation from these numerous decisions reads: **"Notice of Right to File a Civil Action. Under 29 C.F.R. § 1614.408, you also have the right to file a civil action in an appropriate United States district court. If you choose to file a civil action, you may do so - within ninety (90) calendar days of receipt of this decision if no appeal has been filed".** See Appendix R, dated 11/14/96, See Appendix S, dated 11/19/96, and See Appendix T, dated 12/18/96 (with the resulting civil action PJM-

97-0379 actually being filed within ninety (90) calendar days on 02/06/97, as per Appendix Y or VV). See Appendix U, dated 06/19/07, (with the resulting civil action PJM-97-3359 actually being filed within ninety (90) days on 10/03/97, as per Appendix Y or VV). See Appendix V, dated 08/28/97, (with the resulting civil action PJM-97-3495 actually being filed within ninety (90) days on 10/20/97, as per Appendix Y or VV).

Petitioner thus filed five civil actions reciting **"a continuing series of wrongful acts permitting a series of actions"** and **"with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine"**, and with Petitioner following the specific directions and instructions of the Defendants themselves and the Equal Employment Opportunity Commission to file another federal court civil action within 90 days of their final agency and EEOC decisions, (See Appendix R, S, T, U, V, W.) as per 42 U.S.C. § 2000e-16 and 29 C.F.R. § 1614 (See Appendix D).

"Many of the most difficult questions concerning the scope of claim preclusion arise in the context of **continuing wrongful conduct**. ... Whatever the cut-off date, **a continuing series of wrongful acts resulting in ongoing damage to the plaintiff will usually permit a series of actions, with each such action considered to be a separate claim unrestricted**

by the limitation of the claim preclusion doctrine. ... Continuing series of wrongful acts will usually permit series of actions. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) **each time plaintiff is injured by defendant, cause of action accrues; "[A] defendant's continuing course of conduct, even if related to conduct complained of in the earlier lawsuit, generally creates a separate cause of action."** 18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled **"Continuing Wrongful Conduct by Defendant"**.

IV. FRCP RULE 42 CONSOLIDATION

May a party file, have docketed, and have seriously considered, motions for consolidation "when actions involving a common question of law or fact are pending before the court", to quote FRCP Rule 42?

Is the pendency of an earlier action in the same federal district court a ground for the sua sponte dismissal, without any much less a reasonable opportunity to be heard, of a subsequently instituted action that is based on a different cause of action than that in the pending action against the same defendants, or is the proper solution if there are "common questions of law or fact pending before the court" to consolidate the actions?

In each of the civil actions, since these

were "actions involving a common question of law or fact pending before the court", petitioner filed motions and memorandums in support of the motions for consolidation (See Appendix X, Y, DD, EE).

"The common question standard has a long history, figuring in such landmark decisions as *Mutual Life Ins. Co. v. Hillmon*, where the Supreme Court made an order consolidating three separate lawsuits regarding the death of an insured, because the actions were "of like nature and relative to the same question." The Court justified its decision as one calculated to "avoid unnecessary cost and delay". *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892) (landmark Supreme Court consolidation case involving dispute over life insurance policies)." 8 Moore's Federal Practice, § 42.10 [1] [a] (Matthew Bender 3d ed. 1997).

V. FRCP RULE 15 AMENDED PLEADINGS

"May" "a party amend the party's pleading once as a matter of course at any time before a responsive pleading is served", to quote Federal Rules of Civil Procedure Rule 15?

Defendants never served a "responsive pleading" in petitioner's civil actions.

On September 08, 1998 in PJM-96-2913, Petitioner filed a "Motion for Leave to File an Amended Complaint" (See Exhibit FF) and "Memorandum in Support of Plaintiff's motion for leave to file an Amended Complaint" (See

Exhibit GG) **once as a matter of course at any time before a responsive pleading is served**, since **Defendants never did serve a "responsive pleading" in any of petitioner's civil actions**, with the same **verified "Amended Complaint"** that Petitioner had filed on August 19, 1998 without a "Motion for Leave to File an Amended Complaint", (in the only civil action which did not then have a **verified pleading** let us not forget), (See Appendix AA and BB) according to the specific directions and instructions of the district court which stated that a "Motion for Leave to File an Amended Complaint" was required (See Appendix CC), and containing the facts and transactions and claims and issues of Petitioner's timely filed additional civil actions, PJM-97-379, PJM-97-3359, and PJM-97-3495, (See Appendix FF and GG) which had been dismissed for although they were supposedly not "actions involving a common question of law or fact are pending before the court" they were nevertheless supposedly "duplicative of claims" (See Appendix JJ, WW, XX).

Please see appendix GG for some of the many favorable cases regarding FRCP Rule 15.

"The leading case regarding the trial court's exercise of discretion to deny amendment is *Foman v. Davis*. (*Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962)). In *Foman*, the Supreme Court asserted that "outright refusal to grant the

leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 3 Moore's Federal Practice, § 15.15 [1] (Matthew Bender 3d ed.).

Verified pleadings "may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (**verified complaint treated as equivalent of an affidavit on a motion for summary judgment**) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings.

VI. FRCP RULE 55 JUDGMENT BY DEFAULT

Is it fair that the United States government can repeatedly purposefully "fail to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise" with impunity?

Petitioner filed motions for judgment by default according to Federal Rules of Civil Procedure Rule 55 in each of his civil actions (See Appendix Z).

As an example, on October 08, 1998, since

Defendants had **"failed to plead or otherwise defend as provided by these rules and that fact was made to appear by affidavit or otherwise"**, and in fact since Defendants had not filed anything in PJM-96-2913 since their September 01, 1998 "Motion for Enlargement of Time to Respond to [Petitioner's **verified] Amended Complaint**" "through and including September 30, 1998" (See Appendix BB), which motion was granted by the district court on September 18, 1998 (See Appendix KK), Petitioner filed "Plaintiff's Motion for Judgment by Default According to Federal Rules of Civil Procedure Rule 55", (See Appendix MM) and "Plaintiff's Memorandum in Support of Plaintiff's Motion for Judgment by Default According to Federal Rules of Civil Procedure Rule 55" (See Appendix NN), as Petitioner had previously done in civil actions PJM-97-379, PJM-97-3359, and PJM-97-3495 (See Appendix Z), (which may be the real reason these civil actions were actually dismissed, for they were not really "duplicative of claims", but rather that **PJM-97-379, PJM-97-3359, and PJM-97-3495 were "duplicative of plaintiff's motions for judgment by default against defendants"**. (See Appendix Z). PJM-97-379, PJM-97-3359, and PJM-97-3495 were also **duplicative of verified pleadings**, and in fact PJM-96-2913 was the only civil action of petitioner which at that time did not have a **verified pleading**. Given a choice between procedurally inappropriately

dismissing PJM-97-379, PJM-97-3359, and PJM-97-3495, which all had **verified pleadings**, or PJM-96-2913 which did not have a **verified pleading** and which **amended verified pleading** the Clinton appointed pro affirmative action and pro diversity district court judge would under no circumstances even consider for that very reason, one can readily appreciate the motivation behind what really happened (See Appendix WW, XX).

VII. MOTIONS, PLEADINGS, AFFIDAVITS, APPEALS AUTHORIZED BY THE FRCP AND TITLE VII

Is it an abuse of discretion for a district court to order plaintiff to file no further pleadings or motions or affidavits or appeals authorized by the FRCP or Title VII, or to dismiss and refuse to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP or Title VII, including "amend[ing] the party's pleading once as a matter of course at any time before a responsive pleading is served", or motions to "amend the party's pleading by leave of court ... which shall be freely given when justice so requires", or motions for consolidation in "actions involving a common question of law or fact pending before the court", or motions for a preliminary or a permanent injunction on the racial and gender and national origin classifications of the United States federal government's so called affirmative action and diversity programs?

In PJM-96-2913 the district court dismissed all of petitioner's pending motions stating that **"The Court will not consider these motions, docketed Papers 70, 71, 72, 74, 75, and 86."**. The district court also stated that "The Clerk of this Court will be directed to not docket any more pleadings by Plaintiff", (See Appendix LL and OO).

Docketed paper #74 in PJM-96-2913 filed on September 08, 1998 was petitioner's motion and memorandum in support of the motion for consolidation of petitioner's five federal court civil actions, (See Appendix DD and EE).

Docketed paper #75 was Petitioner's "Motion for Leave to File an Amended Complaint" "once as a matter of course before a responsive pleading has been served", and petitioner's "Memorandum in support of the motion for leave to file an amended complaint" "once as a matter of course before a responsive pleading has been served", with the same verified "Amended Complaint" that Petitioner had filed on August 19, 1998 without a "Motion for Leave to File an Amended Complaint" in PJM-96-2913, (in the only civil action which did not then have a verified pleading), (See Appendix AA and BB), and which petitioner had filed according to the specific directions and instructions of the district court itself on September 02, 1998 which stated that a "Motion for Leave to File an Amended Complaint" was required (See Appendix CC), and which contained the facts and

transactions and claims and issues of Petitioner's timely filed four additional civil actions (See Appendix FF and GG).

Docketed paper #86 in PJM-96-2913 filed on October 06, 1998 was petitioner's motion and memorandum in support of the motion for a preliminary injunction or in the alternative permanent injunction against elements of the United States federal government's and the National Institutes of Health's (NIH) so called affirmative action programs or diversity programs or Federal Equal Opportunity Recruitment Program (FEORP) or Affirmative Employment Program (AEP) which give preferences and favoritism to minorities, women, and hispanics, and which by the denial of those same preferences and favoritism to white males correspondingly to the same degree harm white males (See Appendix J, K, HH, II).

Petitioner filed a petition for a writ of mandamus with the USCAFC (See Appendix PP, QQ, RR, and SS). Petitioner filed a petition for a writ of mandamus with the US Supreme Court (See Appendix TT, UU, Q). (Also see Appendix L, M, N, O, P, and Q for details of petitioner's previous petition for a writ of mandamus.)

"Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, see *In re Martin-Trigona*, 737 F.2d 1254, 1261-1262 (2d Cir. 1984), or a failure to comply with sanctions imposed for such conduct, *Johl v. Johl*, 788

F.2d 75 (2d Cir. 1986) (per curium), a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, at 652 (2d Cir. 1987).

The above has been quoted in over 200 cases, such as *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1256 (2nd Cir.(N.Y.) 1996); *Milltex Industries Corp. v. Jacquard Lace Co., Ltd.*, 55 F.3d 34, at 39 (2nd Cir.(N.Y.) 1995); *Schoenberg v. Shaposlky Publishers, Inc.*, 971 F.2d 926, 936 (2nd Cir.(N.Y.) 1992); Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 102; and *In re Halliburton Co.*, 991 F.2d 810, 1993 WL 118929, (Fed.Cir.(Tex.), March 12, 1993) (See Appendix Q).

Petitioner has been in effect precluded from any meaningful action in the court proceedings or any meaningful "access to the court system", *Moy v. United States*, 906 F. 2d 467, 470 (9th Cir. 1990). **Petitioner has in effect had his "constitutional right of access to the courts"**, (*Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1994, 52 L.Ed. 2d 72 (1977)) **and "his right to adequate, effective, and meaningful access"**, (*Bounds*, 430 at 822, 97 S.Ct. at 1495) **to the courts curtailed and abridged. "It sanctions access restrictions that standing alone might or might not be**

objectionable but which "taken together [are] so burdensome as to deny the litigant meaningful access to the courts", *In re Green*, 669 F. 2d 779, at 786, (D.C.Cir. 1981) (per curiam); *Abdullah v. Gatto*, 773 F.2d 487, at 488 (2d Cir. 1985) (per curiam)", *Procup v. Strickland*, 792 F.2d 1069, at 1078 (11th Cir. 1986) (en banc, per curiam).

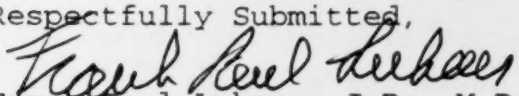
CONCLUSION

Petitioner hereby respectfully makes an application to the Court for an order that the district court apply strict scrutiny to the racial and gender and national origin classifications of the United States federal government's affirmative action and diversity programs for minorities and females and hispanics and determine whether they are narrowly tailored measures that further compelling governmental interests, as per *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523.

Petitioner hereby respectfully makes an application to the Court for an order that the district court be directed to allow the filing and docketing and to seriously consider all motions, pleadings, affidavits, and appeals authorized by the Federal Rules of Civil Procedure (FRCP) and Title VII, including Rule 65 motions for **a preliminary injunction or a permanent injunction** on the racial and gender and national origin classifications of the United States federal government's so called

affirmative action and diversity programs, and including Rule 56 motions for **partial summary judgment** on defendants intentional violation of 29 C.F.R. § 1614 mandatory processing and investigation of this white male's EEO complaints, and including 42 U.S.C. 2000e et seq. (Title VII) and 29 C.F.R. § 1614 rights **"to file a civil action in an appropriate United States District Court" "Within 90 days of receipt of the final decision"**, and including Rule 42 motions for consolidation in **"actions involving a common question of law or fact pending before the court"**, and including Rule 15 rights to **"amend the party's pleading once as a matter of course at any time before a responsive pleading is served"** and Rule 15 motions to **"amend the party's pleading by leave of court ... which shall be freely given when justice so requires"**, and including Rule 55 motions for **judgment by default**.

Respectfully Submitted,



Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Petitioner Pro Se

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770

MEMORANDUM

TO: Frank Paul Lukacs

FROM: Judge Peter J. Messitte

RE: Lukacs v. Shalala

Civil No. PJM-96-2913

Date: October 13, 1998

The Court notes that Plaintiff has recently filed several pleadings, despite the Court's Order of June 30, 1997 directing the parties to file no further motions until the Court rules on Defendant's pending Motion to Dismiss or in the Alternative for Summary Judgment. The Court will not consider these motions, docketed Papers 70, 71, 72, 74, 75, and 86. These pleadings are all deemed DENIED without prejudice.

Any attempt of Plaintiff to file further

pleadings until the Court's ruling on said Motion to Dismiss or in the Alternative for Summary Judgment will be made at the risk of sanctions.

The Clerk of this Court will be directed to not docket any more pleadings by Plaintiff until the Court's ruling on said motion.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-2621

FRANK PAUL LUKACS,

Plaintiff - Appellant,

versus

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES; HAROLD E. VARMUS, Doctor, Director, National Institutes of Health; RICHARD KLAUSNER, Doctor, Director, National Cancer Institute; BEVERLY LOTT WYATT, Chief, Research Contracts Branch, National Cancer Institute; DAVID SNIGHT, Chief, Research Contracts Branch, Division of Contracts and Grants, OA, OD, National Institutes of Health; PHILIP AMORUSO, Executive Director, National Cancer Institute; MAXINE RICHARDSON, Equal Opportunity Manager, National Cancer Institute; MARIANNE WAGNER, Personnel Officer, National Cancer Institute; DIANE ARMSTRONG, Director Equal Employment Opportunity, National Institutes of Health; JAMES KING, Director, Office of Personnel Management; SANDRA THOMAS, Equal Employment Opportunity Manager, National Cancer Institute,

Defendants - Appellees.

Appeals from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, District Judge. (CA-96-2913-PJM)

Submitted: March 16, 1999

Decided: April 07, 1999

Before WIDENER and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Frank Paul Lukacs, Appellant Pro Se. George Levi Russell, III, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Frank Paul Lukacs appeals the district court's orders denying several of his pending motions (No. 98-2621) and granting Defendants' motion to dismiss and for summary judgment (No. 99-1108). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm both orders on the reasoning of the district court. Lukacs v. Shalala, No. CA-96-2913-PJM (D. Md. Oct. 21, 1998;* Nov. 17, 1998). We deny Lukacs's motion for a stay pending appeal. We grant Lukacs's motion to file a supplement to his informal brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

---

*Although the district court's order is marked as "filed" on October 19, 1998, the district court's records show it was entered on the docket sheet on October 21, 1998. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the order was entered on the docket sheet that we take as the effective date of the district court's decision. See Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-2621

CA-96-2913-PJM

FRANK PAUL LUKACS,

Plaintiff - Appellant,

versus

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES; HAROLD E. VARMUS, Doctor, Director, National Institutes of Health; RICHARD KLAUSNER, Doctor, Director, National Cancer Institute; BEVERLY LOTT WYATT, Chief, Research Contracts Branch, National Cancer Institute; DAVID SNIGHT, Chief, Research Contracts Branch, Division of Contracts and Grants, OA, OD, National Institutes of Health; PHILIP AMORUSO, Executive Director, National Cancer Institute; MAXINE RICHARDSON, Equal Opportunity Manager, National Cancer Institute; MARIANNE WAGNER, Personnel Officer, National Cancer Institute; DIANE ARMSTRONG, Director Equal Employment Opportunity, National Institutes of Health; JAMES KING, Director, Office of Personnel Management; SANDRA THOMAS, Equal Employment Opportunity Manager, National Cancer Institute,

Defendants - Appellees.

FILED June 14, 1999

On Petition for Rehearing
and Rehearing In Banc

Petitioner's petition for rehearing and rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

Fourteenth Amendment Equal Protection Clause of the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment Due Process Clause of the United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. §2000e-16, et seq. under Title VII of the Civil Rights Act of 1964

42 U.S.C. §2000e-16 states that "All personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on race, color, religion, sex, or national origin."

42 U.S.C. §2000e-16 states that "Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, ... an employee or applicant for employment ... may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), 5 U.S.C. §7201 (d)

5 U.S.C. §7201 (a) states that "For the purpose of this section - (1) "underrepresentation" means a situation in which the number of members of a minority group designation (determined by the Equal Employment Opportunity Commission in consultation with the Office of Personnel Management, on the basis of the policy set forth in subsection (b) of this section) within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States, as determined under the most recent decennial or mid-decade census, or current population survey, under title 13".

5 U.S.C. §7201 (c) states that "the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable - (1) that each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service,

with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited; and (2) that the Office conduct a continuing program of (A) assistance to agencies in carrying out programs under paragraph (1) of this subsection, and (B) evaluation and oversight and such recruitment programs to determine their effectiveness in eliminating such minority underrepresentation."

5 U.S.C. §7201 (d) states that "the Equal Employment Opportunity Commission shall - (1) establish the guidelines proposed in carrying out the program required under subsection (c) of this section: and (2) make determinations of underrepresentation which are proposed to be used initially under such program; and (3) transmit to the Executive agencies involved, to the Office of Personnel Management, and to the Congress the determinations made under paragraph (2) of this subsection."

5 C.F.R. §720.202 (a), 5 C.F.R. §720.202 (e), 5 C.F.R. §720.205 (c)

5 C.F.R. §720.202 (a) states that "Underrepresentation means a situation in which the number of women or members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees

within the employment category than the percentage of women or the minority constitutes within the civilian labor force of the United States, in accordance with section 720.205 (c) and (d)."

5 C.F.R. §720.202 (e) states that "Recruitment means the total process by which the Federal Government and the Federal agencies locate, identify, and assist in the employment of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through programs of training, work experience, or both."

5 CFR §720.205 (c) states that "Where an agency or agency component located in a geographical area where the percentage of underrepresented groups in the area civilian labor force is higher than their percentage in the national labor force, the agency or component must base its plans on the higher level of representation in the relevant civilian labor force."

29 C.F.R. § 1614.408 Civil action: Title VII, Age Discrimination in Employment Act, and Rehabilitation Act

29 C.F.R. § 1614.408 regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances specifically states that "A complainant who has filed an individual complaint ... is authorized under Title VII, the ADEA, and the Rehabilitation Act to file a civil action in an appropriate United States District Court

Within 90 days of receipt of a final decision on an individual or class complaint if no appeal has been filed or Within 90 days of receipt of the Commission's final decision on an appeal".

Attachment 1 to FPM Letter 720-2, Office of Personnel Management (OPM), Federal Personnel Manual (FPM)

OPM Attachment 1 to FPM Letter 720-2 defines minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of

Europe.

OPM Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows: "(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. (b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

OPM Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that "in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language".

OPM Attachment 1 to FPM Letter 720-2 states that "An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex in a category of Federal employment and (b) the percentage of that same group in the civilian labor force either nationally or locally." Furthermore, "agencies need to compare both national and local", (State or standard metropolitan statistical area ("SMSA)), "civilian labor force data for each minority/sex group, and under OPM's regulations, must generally use the higher of the two percentages in making each underrepresentation determination".

OPM Attachment 1 to FPM Letter 720-2 states that "It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor data without regard to the availability of minorities and women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades".

Department of Health and Human Services (DHHS) Career Opportunity Training Agreement (COTA)

DHHS COTA states that "Selection Method: Through the use of the Department of Health and Human Services Training Agreement for Career Opportunities, employees who do not

meet the basic qualification requirements, as stated in the X-118 Qualification Standards, will be given the opportunity to be competitively selected for the above position."

29 C.F.R. 1614.108 Investigation of Complaints

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact finding conferences or any other fact finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of the Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation, or alternatively by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decision maker should, or the Commission on appeal may, in appropriate circumstances:

(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission may, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigations within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f), Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the

investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to section 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

42 U.S.C. §2000e-2, et seq. under Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2. Unlawful Employment Practices provides

"(a) it shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Federal Rules of Civil Procedure
Rule 15. Amended and Supplemental Pleadings.

Federal Rules of Civil Procedure Rule 15 (a) Amendments specifically states:
"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Federal Rules of Civil Procedure
Rule 42. Consolidation; Separate Trials

Federal Rules of Civil Procedure Rule 42 (a) Consolidation specifically states:
"(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in

the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

APPENDIX E

Some of the many individual elements of the United States federal government's and the National Institutes of Health's so called affirmative action or diversity programs for minorities and females and hispanics include but are not limited to such elements as the Federal Equal Opportunity Recruitment Program (FEORP); the Affirmative Employment Program (AEP); the legislation of 5 U.S.C. §7201 (a); the legislation of 5 U.S.C. §7201 (c); the legislation of 5 U.S.C. §7201 (d); the elements of 5 C.F.R. §720.202 (e), especially those referring to "qualifiable" minorities and women, namely "those who have the potential but do not presently meet valid qualification requirements", namely those minorities and women who do not have even the minimum "training, work experience, or both" for the advertised job vacancy announcements, which are discriminatory and without authority in 5 U.S.C. §7201, the statute which the regulations supposedly implement; the elements of 5 C.F.R. §720.202 (a), especially those authorizing females to also receive the benefits of so called affirmative action for minorities, which are discriminatory and without authority in 5 U.S.C. §7201, the statute which the regulations supposedly implement, and which only authorizes minorities to receive the benefits of so called affirmative action; the elements of 5

C.F.R. §720.202 (a) and the elements of 5 C.F.R. §720.205(e), especially those referring to the appropriate labor force, which is taken as the higher of the national or local minority or female labor force for the purposes of comparison, and which are discriminatory and without authority in 5 U.S.C. §7201, the statute which the regulations supposedly implement, which statute only authorizes use of the minority national labor force; the Federal Equal Opportunity Recruitment Program regulations on so called "underrepresentation", in which the "Data that is used in determining underrepresentation is (1) An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex group in a category of federal employment and (b) the percentage of that same group in the civilian labor force (either nationally or locally)" and in which "It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor force data without regard to the availability of minorities or women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades.", and the mandatory classifications on the basis of race and gender which are discriminatory; the United States Equal Employment Opportunity Commission's "Instructions for the Development

and Submission of Federal Affirmative Employment Multi-Year Program Plans, Annual Accomplishment Reports, and Annual Plan Updates"; Executive Order 11478 as amended by Executive Order 12106 which established requirements for federal agency Affirmative Employment Programs; the Office of Personnel Management classification of minorities by race and national origin under the Federal Equal Opportunity Recruitment Program, which includes everyone from every continent to receive the benefits of so called affirmative action for minorities except caucasians having origins in Europe, and which includes everyone of hispanic origin on the basis of the Spanish language or surname to also receive the benefits of so called affirmative action for minorities; the purposeful exclusion of relevant qualifications and merit from consideration for Federal Equal Opportunity Recruitment Program designated job openings in order to greatly increase the probability, to almost the point of certainty, of a minimally qualified or even a totally unqualified minority or female or hispanic to be evaluated as being highly qualified and to be selected for job openings, and to correspondingly greatly decrease the probability, to almost the point of certainty, of a much more qualified white male, especially one over forty years of age and of Hungarian origin, to be evaluated as being highly qualified and to be selected for the advertised job vacancy

announcements; the failure of federal agencies to comply with the mandatory 30 Day processing time for informal equal employment opportunity complaints, which is a violation of 29 C.F.R. §1614, and the failure of federal agencies to comply with the mandatory 180 days for completion of investigation of formal equal employment opportunity complaints, which is a violation of 29 C.F.R. §1614, with EEO complaints from white males challenging the legality and constitutionality of so called affirmative action for minorities and females and hispanics being purposefully delayed or simply intentionally not being independently processed or investigated for years precisely because they are EEO complaints from a white male complaining about so called affirmative action programs for minorities and females and hispanics, while at the same time other EEO complaints during those same years are being actively and aggressively processed and actively and aggressively investigated simply because these EEO complaints are from minorities or females or hispanics; the failure of federal agencies to seriously consider, interview, or select white males for Federal Equal Opportunity Recruitment Program designated job openings; the preferences and favoritism for minorities and women under the Federal Equal Opportunity Recruitment Program and the Affirmative Employment Program, and the creation of barriers to the selection, hiring, and promotion of white males,

especially those most qualified and over forty years of age; the Equal Employment Opportunity Commission's (EEOC) responsibility to establish and maintain discriminatory affirmative action programs for minorities and females, and their dual mutually exclusive functions to ensure real equal employment opportunity regardless of race or sex or national origin or age, which represent a conflict of interest and have the appearance of partiality, prejudice, and bias, and which are discriminatory against caucasian males; the federal government officials' responsibilities to establish and maintain discriminatory affirmative action programs for minorities and females, and their dual mutually exclusive functions to ensure real equal employment opportunity regardless of race or sex or national origin or age, which represent a conflict of interest and have the appearance of partiality, prejudice, and bias, and which are discriminatory against caucasian males; the Federal Equal Opportunity Recruitment Program and Affirmative Employment Program requirement for the justification and approval of the selection of the best qualified white male, but not for the selection of even minimally qualified or even totally unqualified minorities and females; the mandatory classification of applicants and candidates for job vacancy announcements by race and gender, and especially such mandatory classifications by race and gender by none

other than the selecting official as the selecting official interviews the applicants and candidates; the selection by the FEORP Operations Coordinator under the Federal Equal Opportunity Recruitment Program (FEORP) of Qualifications Review Board (QRB) members, who evaluate and refer eligible candidates for selection, who are themselves minorities and women, and who promote the selection of minorities and women and the nonselection of white males; the violation of the requirement to rank or group candidates and refer only a reasonable number (normally 3 to 5) of the best qualified candidates for selection, [and in fact in two job vacancy announcements herein cited referring a total of sixty two and sixty nine supposedly "best qualified" candidates to the selecting official], in order to give preference and favoritism to minimally qualified minorities and females, which is discriminatory against best qualified white males; and the Career Opportunities Training Program ("COTA"), and "STRIDE, START, and ACCESS", in which minority and female and hispanic "employees who do not meet the basic qualifications requirements as found in the Qualifications Standards Handbook", in other words minorities and females and hispanics who are not just minimally qualified but who are in fact totally unqualified for the job vacancy announcement, "will be given the opportunity to be competitively selected and trained for the position", which means that

these totally unqualified people will only compete with other totally unqualified people and will be selected and hired anyway for the job vacancy announcement for which they are totally unqualified as so called "trainees", rather than white males who are already highly qualified for the position, [which is precisely what happened to plaintiff-appellant in one job vacancy announcement], and then after being hired and while receiving a full salary they will be so called "trained" for the duties and responsibilities of the positions which they cannot perform but for which positions they have already been hired."

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*May 14, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*August 18, 1997
	*Civil Action #
v.	*PJM-97-379
	*
DONNA E. SHALALA, et al.	*January 09, 1998
	*Civil Action #s
Defendants	*PJM-97-3359
	*PJM-97-3483
* * * * * * * * * * * * * * *	*PJM-97-3495

MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

OR IN THE ALTERNATIVE MOTION TO ISSUE A DECISION FULLY OR PARTIALLY IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO EXCLUDE ALL EVIDENCE OFFERED BY DEFENDANTS FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29

C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO CONSIDER THE MATTERS TO WHICH THE INFORMATION OR TESTIMONY OF PLAINTIFF'S EEO COMPLAINTS PERTAINS TO BE ESTABLISHED IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO DRAW AN ADVERSE INFERENCE THAT THE INFORMATION, OR ANY TESTIMONY OF DEFENDANTS, FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 WOULD HAVE REFLECTED UNFAVORABLY ON DEFENDANTS WHO REFUSED TO PROVIDE THE INFORMATION WHICH WOULD HAVE RESULTED FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614, AND WHICH INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 DEFENDANTS DID NOT COMPLETE WITHIN THE MANDATORY 180 DAYS, AND IN FACT WHICH INVESTIGATION DEFENDANTS EVEN YEARS LATER HAVE PURPOSEFULLY AND INTENTIONALLY NEVER EVEN BEGUN BECAUSE THEY WERE EEO COMPLAINTS FROM A WHITE MALE AGAINST AFFIRMATIVE ACTION FOR MINORITIES AND FEMALES AND HISPANICS,

AND, OR IN THE ALTERNATIVE, FOR DEFENDANTS TO

PAY FOR THE ENTIRE COSTS OF DISCOVERY BY A COURT APPOINTED ATTORNEY OR A PRACTICING ATTORNEY OF PLAINTIFF'S CHOICE OF ALL OF PLAINTIFF'S EEO COMPLAINTS PRESENTLY BEFORE THIS FEDERAL COURT AND UPON WHICH DEFENDANTS HAVE NOT COMPLETED THE REQUIRED AND MANDATORY INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 TO "DEVELOP A COMPLETE AND IMPARTIAL FACTUAL RECORD UPON WHICH TO MAKE FINDINGS ON THE MATTERS RAISED BY THE WRITTEN COMPLAINT" AND TO "EFFICIENTLY AND THOROUGHLY ADDRESS THE MATTERS AT ISSUE"

Now comes the Plaintiff and moves for this court to issue a decision fully or partially in favor of Plaintiff for Defendants failure to perform an investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614, and, or in the alternative, motion to exclude all evidence offered by Defendants for Defendants failure to perform an investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614, and, or in the alternative, motion to consider the matters to which the information or testimony of Plaintiff's EEO complaints pertains to be established in favor of Plaintiff for Defendants failure to perform an investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614, and, or in the alternative, motion to draw an adverse inference that the information or any testimony of Defendants

from the investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614 would have reflected unfavorably on Defendants who refused to provide the information which would have resulted from the investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614 and which investigation of Plaintiffs EEO complaints according to 29 C.F.R. § 1614 Defendants did not complete within the mandatory 180 days and in fact which investigation Defendants even years later have purposefully and intentionally never even begun because they were EEO complaints from a white male against affirmative action for minorities and females and hispanics, and, or in the alternative, for Defendants to pay for the entire costs of discovery by either a court appointed attorney or a practicing attorney of Plaintiff's choice of all of Plaintiff's EEO complaints presently before this federal court and upon which Defendants have not completed the required and mandatory investigation of Plaintiff's EEO complaints according to 29 C.F.R. § 1614 to "develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint" and to "efficiently and thoroughly address the matters at issue".

The reasons for these motions are set forth in the accompanying memorandum.

Respectfully Submitted,

Frank Paul Lukacs, J.D., M.B.A.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*May 14, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*August 18, 1997
	*Civil Action #
v.	*PJM-97-379
	*
DONNA E. SHALALA, et al.	*January 09, 1998
	*Civil Action #s
Defendants	*PJM-97-3359
	*PJM-97-3483
* * * * * * * * * * * * * * *	*PJM-97-3495

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

AND, OR IN THE ALTERNATIVE, MOTION TO ISSUE A DECISION FULLY OR PARTIALLY IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO EXCLUDE ALL EVIDENCE OFFERED BY DEFENDANTS FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION

OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO CONSIDER THE MATTERS TO WHICH THE INFORMATION OR TESTIMONY OF PLAINTIFF'S EEO COMPLAINTS PERTAINS TO BE ESTABLISHED IN FAVOR OF PLAINTIFF FOR DEFENDANTS FAILURE TO PERFORM AN INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614,

AND, OR IN THE ALTERNATIVE, MOTION TO DRAW AN ADVERSE INFERENCE THAT THE INFORMATION, OR ANY TESTIMONY OF DEFENDANTS, FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 WOULD HAVE REFLECTED UNFAVORABLY ON DEFENDANTS WHO REFUSED TO PROVIDE THE INFORMATION WHICH WOULD HAVE RESULTED FROM THE INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614, AND WHICH INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 DEFENDANTS DID NOT COMPLETE WITHIN THE MANDATORY 180 DAYS, AND IN FACT WHICH INVESTIGATION DEFENDANTS EVEN YEARS LATER HAVE PURPOSEFULLY AND INTENTIONALLY NEVER EVEN BEGUN BECAUSE THEY WERE EEO COMPLAINTS FROM A WHITE MALE AGAINST AFFIRMATIVE ACTION FOR MINORITIES AND FEMALES AND HISPANICS,

AND, OR IN THE ALTERNATIVE, FOR DEFENDANTS TO PAY FOR THE ENTIRE COSTS OF DISCOVERY BY A COURT APPOINTED ATTORNEY OR A PRACTICING ATTORNEY OF PLAINTIFF'S CHOICE OF ALL OF PLAINTIFF'S EEO COMPLAINTS PRESENTLY BEFORE THIS FEDERAL COURT AND UPON WHICH DEFENDANTS HAVE NOT COMPLETED THE REQUIRED AND MANDATORY INVESTIGATION OF PLAINTIFF'S EEO COMPLAINTS ACCORDING TO 29 C.F.R. § 1614 TO "DEVELOP A COMPLETE AND IMPARTIAL FACTUAL RECORD UPON WHICH TO MAKE FINDINGS ON THE MATTERS RAISED BY THE WRITTEN COMPLAINT" AND TO "EFFICIENTLY AND THOROUGHLY ADDRESS THE MATTERS AT ISSUE"

"Federal statute 29 C.F.R. §1614.108, sections (e) and (f), specifically state that:

"the agency shall complete its investigation within 180 days of the date of filing of an individual complaint" ... "within 180 days from the filing of the complaint, ... the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to section 1614.110 from the agency with which the complaint was filed."

Defendants intentionally and purposefully violated federal statute 29 C.F.R. §1614.108, sections (e) and (f)."

The Code of Federal Regulations, as per 29 C.F.R. §1614.108 Investigation of Complaints specifically states that: **"(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed."** (with no additional requirement as Defendants would have this court erroneously believe). 29 C.F.R. § 1614.108 continues with **"(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint."** (with the point being that the agency is first supposed to develop a complete and impartial factual record upon which to make findings, rather than as Defendants have consistently done to Plaintiff made their findings and decisions before there was any factual record upon which to make a finding, much less a complete and impartial factual record upon which to make their findings, and what Defendants would now like to do in federal court so that a judge make his findings and decisions before there is a complete and impartial factual record upon which to make the findings and decisions). 29 C.F.R. §

1614.108 (b) continues with **"Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact finding conferences or any other fact finding methods that efficiently and thoroughly address the matters at issue"** (any of which fact finding methods was precisely what Defendants wanted to avoid for they knew that the fact finding would merely produce evidence in Plaintiff's favor, and so Defendants purposefully decided that if that was going to be the end result anyway, that they would rather not do any of the mandatory fact finding at all).

29 C.F.R. § 1614.108 (c) continues with **"The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:**

(1) The complainant, the agency, and any employee of the Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation, or alternatively by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the

attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate."

Plaintiff's only comment at this point, given subsection (3) above, is what should be the appropriate remedy, using the words of subsection (3) above "When the agency against which a complaint is filed, or its employees fail without good cause shown to" ever process or investigate an EEO complaint "fully and in timely fashion" and intentionally refuses to produce any "documents, records, comparative data, statistics, affidavits, or the attendance of witness(es)"? Should the federal court now to use the words of

subsection (3) above

"(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party"?

Obviously, rather than granting defendants' motion to dismiss or in the alternative motion for summary judgment, Plaintiff sincerely believes that real justice requires that any or all of the above enumerated consequences of Defendants purposeful actions in failing to process Plaintiff's EEO complaints or to conduct the mandatory independent investigations should apply, and Plaintiff hereby formally requests such remedies, which is realistically the only way that Defendants will ever process EEO complaints and conduct independent investigations of EEO complaints by white males against elements of affirmative action.

29 C.F.R. § 1614.108 (d) continues with "Any investigation will be conducted by investigators with appropriate security

clearances. The Commission may, upon request, supply the agency with the name of an investigator with appropriate security clearances."

29 C.F.R. § 1614.108 (d) continues with the all important rule which has been consistently violated by Defendants in that **"(e) The agency shall complete its investigations within 180 days of the date of filing of an individual complaint"**. This section alone is dispositive, and contrary to Defendants attempts at trying to deceive the court into believing that there is some additional magical or mystical requirement, the section speaks for itself in that **"(e) The agency shall complete its investigations within 180 days of the date of filing of an individual complaint"**, period!

We are not just talking about missing this 180 day deadline by perhaps a day or two, but as Plaintiff has stated in his complaint we are talking about **"To date, almost five years later, which is almost ten times the mandatory 180 day federal deadline for completing investigations, an investigation by DHHS has not even begun much less been completed with respect to said formal complaints.**". In addition we are not just talking about Defendants having accidentally missed this mandatory independent investigation deadline date maybe once or twice, but we are talking about Defendants

intentionally and purposefully not even beginning any of these mandatory independent investigations on dozens of Plaintiff's EEO complaints. And why, simply because he is a white male complaining about being harmed and injured by so called affirmative action programs, programs which let us not forget those responsible for initiating and maintaining such so called affirmative action programs, are also the ones responsible for processing Plaintiff's EEO complaints against so called affirmative action programs, and are also the ones responsible for ordering that the mandatory independent investigations of such EEO complaints should begin, not to mention actually be completed, within the required statutory period of 180 days.

What really galls Plaintiff in all of this is that first Defendants simply refuse to do any of the mandatory independent investigations, especially since they knew or should have known that these mandatory independent investigations would have produced evidence in Plaintiff's favor, and now through no less than the so called justice department who should themselves be investigating the complete absence of any of the mandatory independent investigations, seek a motion to dismiss or in the alternative motion for summary judgement, precisely to now avoid Plaintiff having even the opportunity to have any depositions or discovery to prove his case on the merits and introduce the very evidence

which Defendants should have provided to Plaintiff during the mandatory independent investigations. Unfortunately, the end result of granting the motion to dismiss or in the alternative motion for summary judgement would be precisely to reward Defendants for their inappropriate and illegal behavior, for from now on Defendants would know that any time they didn't want to do the mandatory independent investigation because the results would not be in their favor, they would simply not do any of the required mandatory independent investigations, much less within the required statutory period of 180 days, and that future prospective Plaintiffs would never have even any opportunity at depositions and discovery to produce the evidence and prove their case on the merits. That perhaps unintended but foreseeable result would most certainly be a miscarriage of justice. ...

Plaintiff filed EEO complaints, and in effect by not processing and independently investigating his EEO complaints, and especially by not providing Plaintiff "with a copy of the investigative file", which would contain "a complete and impartial factual record", Defendants could in effect continue the discriminatory so called affirmative action practices and discriminatory ultimate adverse employment decisions resulting from affirmative action, which is one of the real, although nonlegitimate, and definitely

discriminatory, reasons why there was no processing or independent investigation of Plaintiffs complaints dealing with so called affirmative action in the first place.

Plaintiff's EEO complaints being from a white male against affirmative action were purposefully being "delayed" or simply intentionally not being independently investigated or processed for years and years and years and years and years precisely because they were EEO complaints from a white male against affirmative action, while at the same time other EEO complaints during those same five years were being actively and aggressively investigated and actively and aggressively processed simply because these EEO complaints were from minorities or females and hispanics. ...

(Please also note in exhibit "R", from OEO, NIH, DHHS, that it is none other than Plaintiff's employer who is making the decision to (or not to) process and to (or not to) order an independent investigation according to 29 C.F.R § 1614, contrary to the fact situation of the 1990 case of Young v. Sullivan, although from the case itself "Title VII provides a former employee a remedy against his or her employer" and "Plaintiff does allege that he was employed by NIH DHHS", and as per the seemingly innocuous, but in fact all important, paragraph which states

that "Please be advised that this complaint is being processed pursuant to the provisions of Title 29 Code of Federal Regulations (CFR) Section 1614 which became effective October 1, 1992. Under these regulations you will be issued an investigative file along with an investigative summary.", it becomes obvious that the 1990 case of Young v. Sullivan was decided before "Title 29 Code of Federal Regulations (CFR) Section 1614 became effective October 1, 1992". Thus, Title VII does now create a cause of action for discrimination in the processing and investigation of EEO complaints since this is now a "term, condition, or privilege of employment".) ...

"Once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship. [FN5] In the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace. The contractual relationship of employment triggers the provision of Title VII governing "terms, conditions, or privileges of employment." Title VII in turn forbids discrimination on the basis of "race, color,

religion, sex, or national origin."" Hishon v. King & Spalding, 467 U.S. 69, at 73 (1984). ...

"Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term, condition, or privilege of employment. An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), [FN7] or that form "an aspect of the relationship between the employer and employees," Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971), [FN8] may not be afforded in a manner contrary to Title VII." Hishon v. King & Spalding, 467 U.S. 69, at 75-76 (1984). ...

The reality of the situation is that a

benefit is being conferred by the government upon federal government employees who are minorities and women and hispanics and asians, but that same benefit is being denied by the government to federal government employees who are white males. In this there is supposedly no harm. Complainant maintains that the amount of the benefit being given to minorities and women and hispanics and asians and at the same time being denied to white males is precisely the amount of the loss and harm and injury. Furthermore, if the benefit that is conferred upon minorities and women and hispanics and asians is regarded as a term, privilege, or condition of employment, for that is the precisely the way that the benefit was conferred initially, then the denial of that same benefit to white males is most certainly to be regarded as a term, privilege, or condition of employment. ...

Thus, outside of the issue of the untimely processing of Plaintiff's EEO complaints as a separate and independent claim in the present federal court case, the facts of the untimely processing of Plaintiff's EEO complaints should remain and be considered as additional evidence of the intentional discrimination, and the intentional cover up and whitewash and obstruction of justice, on the part of the agency simply because

Plaintiff's EEO complaints were by a white male complaining about so called affirmative action programs, and the offices which were supposed to be timely processing and ordering an independent investigation had been themselves delegated the responsibility of initiating and maintaining and fully supporting more and more and ever larger and larger affirmative action programs for minorities and females, and therefore these offices simply refused to do anything about EEO complaints by this white male complaining precisely of those discriminatory practices which they themselves were initiating and maintaining and fully supporting. ...

Plaintiff's EEO complaints being from a white male against affirmative action were purposefully being "delayed" or simply intentionally not being independently investigated or processed for years and years and years and years and years precisely because they were EEO complaints from a white male against affirmative action, while at the same time other EEO complaints during those same five years were being actively and aggressively investigated and actively and aggressively processed simply because these EEO complaints were from minorities or females and hispanics. ...

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK PAUL LUKACS	*	
Plaintiff	*	June 10, 1997
v.	*	Civil Action #
DONNA E. SHALALA, et al.	*	PJM 96-2913
Defendants	*	

PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves for leave to supplement his memorandum in opposition to defendants' motion to dismiss or in the alternative for summary judgment with the attached affidavit of Plaintiff according to Rule 56 (f) of the Federal Rules of Civil Procedure.

Rule 56 (f) of the Federal Rules of Civil Procedure states, "When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Since Defendants have purposefully and intentionally refused to conduct the mandatory investigation as codified in 29 C.F.R. § 1614 on Plaintiff's sixth and seventh and tenth and nineteenth and twenty ninth and thirty first and thirty eighth EEO complaints which are presently before this federal court and which would have presented by affidavit facts essential to justify Plaintiff's opposition, and since the requirements according to Rule 26 (d) of the Federal Rules of Civil Procedure "Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)." have not yet been met, there have been no "depositions, answers to interrogatories, and admissions on file," with with to designate

"specific facts showing that there is a genuine issue for trial".

As the Supreme Court itself has stated in Celotex Corporation v. Catrett, 477 U.S. 316 (1986), "In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file."" Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986). Unfortunately, here there have been no "depositions, answers to interrogatories, and admissions on file". The Supreme Court further continues in the next sentence with "Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56 (e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial". Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986). In this case where there are no "depositions, answers to interrogatories, and admissions on file" with which Plaintiff can designate "specific facts showing that there is a genuine issue for trial", Plaintiff is left with merely his own "affidavit" or

declaration to designate "specific facts showing that there is a genuine issue for trial". **The Supreme Court in the next sentence continues with "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986).** The Supreme Court continues in the next sentence with "Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56 (e) permits a proper summary judgment to be opposed by any of the kinds of evidentiary materials listed in Rule 56 (c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." Celotex Corporation v. Catrett, 477 U.S. 316, at 324 (1986). The Supreme Court continued later with "The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), [FN6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery. FN6. **Rule 56(f) provides: Should it appear from the affidavits of a party opposing the motion that he cannot for**

reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Celotex Corporation v. Catrett, 477 U.S. at 326-327.

WHEREFORE, Plaintiff respectfully requests that the court enter an order permitting Plaintiff leave to supplement his memorandum in opposition to defendants motion to dismiss or in the alternative motion for summary judgment with the attached affidavit of Plaintiff according to Rule 56 (f) of the Federal Rules of Civil Procedure.

Respectfully Submitted,

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
Clean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK PAUL LUKACS	
Plaintiff	June 10, 1997
v.	Civil Action #
DONNA E. SHALALA, et al.	PJM 96-2913
Defendants	

AFFIDAVIT OF PLAINTIFF

I, Frank Paul Lukacs, being duly sworn in accordance with law do hereby state and depose the following:

I have personal knowledge of the facts contained in this declaration which are true and correct to the best of my knowledge, information, and belief.

1. There has been no discovery to date since there has not been a scheduling conference held to date, and thus I have not

been able to secure depositions, answers to interrogatories, or admissions on file with with to designate specific facts showing that there is a genuine issue for trial or sufficient facts that would permit me to oppose the motion for summary judgment.

2. The agency has not conducted the mandatory investigations on my sixth and seventh and tenth and nineteenth and twenty ninth and thirty first and thirty eighth EEO complaints which are presently before this federal court which would have presented by affidavit facts essential to justify my opposition to defendants motion for summary judgment.

I, Frank Paul Lukacs, hereby declare, under the penalty of perjury, that the foregoing is true and correct.

Executed on June 10, 1997.

Respectfully submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff, Pro Se

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*June 18, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*January 26, 1998
	*Civil Action #
v.	*PJM-97-3483
	*
DONNA E. SHALALA, et al.	*January 26, 1998
	*Civil Action #
Defendants	*PJM-97-3495
	*

* * * * * * * * * * * * * * * *

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION ACCORDING TO F.R.C.P. RULE 65,
OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT ACCORDING TO F.R.C.P. RULE 57,
OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT ACCORDING TO F.R.C.P. RULE 56,
ON THE FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent

injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the federal government Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Plaintiff further seeks to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), programs of the United States federal government, including but not limited to: The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c); the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender and National Origin, including but not limited to, Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women,

Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, and Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force; the Equal Employment Opportunity Commission's Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the Federal Equal Opportunity Recruitment Program FEORP and the Affirmative Employment Program AEP; the Failure of the United States Government to Seriously Consider, Interview, or Select White Males for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; the Exclusion of Relevant Qualifications from Consideration for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; and the Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program FEORP.

The reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

Frank Paul Lukacs

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*June 18, 1997
	*Civil Action #
FRANK PAUL LUKACS	*PJM-96-2913
	*
Plaintiff	*January 26, 1998
	*Civil Action #
v.	*PJM-97-3483
	*
DONNA E. SHALALA, et al.	*January 26, 1998
	*Civil Action #
Defendants	*PJM-97-3495
	*
* * * * * * * * * * * * * * *	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION ACCORDING TO F.R.C.P. RULE 65, OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT ACCORDING TO F.R.C.P. RULE 57, OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT ACCORDING TO F.R.C.P. RULE 56, ON THE FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

DECLARATORY JUDGMENT

PARTIAL SUMMARY JUDGMENT

The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c), the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program, and the Affirmative Employment Program, Employ Racial Classifications and Gender Classifications and National Origin Classifications, and When Subjected to and Analyzed under Strict Scrutiny are Not Narrowly Tailored and Do Not Further Compelling Government Interests, and Therefore Violate the Fourteenth Amendment Equal Protection Clause of the United States Constitution and Therefore Violate the Fifth Amendment Due Process Clause of the United States Constitution ...

Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women, are Discriminatory and Without Authority in 5 U.S.C. §7201, the Statute which the Regulations Supposedly Implement ...

Furthermore, 5 C.F.R. §720.202 (e) itself states that:

"**Recruitment** means the total process by which the Federal Government and the Federal agencies locate, identify, and assist in the employment of qualified applicants from underrepresented groups for job openings in categories of employment where underrepresentation has been determined. It includes both innovative internal and external recruitment actions. It **is also intended to cover processes designed to prepare qualifiable applicants (those who have the potential but do not presently meet valid qualification requirements) for such job openings through programs of training, work experience, or both.**"

Thus in effect the traditional definition of a more limited recruitment program through an inappropriate redefinition of the very word recruitment now includes the total process of every conceivable assistance and preference and favoritism to the selection and employment of minorities and women, with no foreseeable limitations or boundaries, and in effect has moved from its supposedly harmless temporary remedy basis of justification to a very harmful and discriminatory permanent system of hiring and promoting minorities and women at the direct expense of old white males. Thus affirmative action for minorities and women has become negative action against white

males.

Thus there are special affirmative action programs for totally unqualified minorities and women such as the Career Opportunity Training Agreement (COTA), upward mobility, Stride, and management intern programs. In particular COTA has a self described recruiting and selection method which states that:

"Selection Method: Through the use of the Department of Health and Human Services Training Agreement for Career Opportunities, employees who do not meet the basic qualification requirements, as stated in the X-118 Qualification Standards, will be given the opportunity to be competitively selected for the above position."

Thus through COTA minorities and women who do not meet even the minimum basic qualification requirements, as is specifically published in the OPM book entitled X-118 Qualification Standards, by so called competition restricted to those minorities and women who are totally unqualified, must nevertheless be hired over Plaintiff, or euphemistically given the opportunity to be selected as so called "trainees", must receive priority training over Plaintiff, and must be promoted over Plaintiff. Plaintiff as a highly qualified old white male is harmed by the discriminatory hiring, training, and promotion of such totally unqualified minority

and female "trainees" for positions for which plaintiff who surpasses the basic qualification requirements can not and is not even considered.

Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, are Discriminatory and Without Authority in 5 U.S.C. §7201, the Statute which the Regulations Supposedly Implement ...

Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force, are Discriminatory and Without Authority in 5 U.S.C. §7201, the Statute which the Regulations Supposedly Implement ...

The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender are Discriminatory ...

The OPM regulations state that: "**An underrepresentation determination is a comparison between (a) the percentage of a particular minority/sex in a category of Federal employment and (b) the percentage of that same group in the civilian labor force either nationally or locally.**" (See Attachment 1 to FPM Letter 720-2.) Furthermore, "agencies need to compare both national and local", (State or standard metropolitan

statistical area ("SMSA)), "civilian labor force data for each minority/sex group, and under OPM's regulations, must generally use the higher of the two percentages in making each underrepresentation determination". Id.

Thus once an agency determines that minority/female underrepresentation exists in a given position, that agency is required by OPM regulations to develop a Federal Equal Opportunity Recruitment Program ("FEORP") plan and an Affirmative Employment Program ("AEP") plan. Agencies have the responsibility to continue FEORP efforts until underrepresentation is eliminated.

The OPM Attachment 1 to FPM Letter 720-2, in addition to being an impermissible broad racial classification and an impermissible broad gender classification, improperly discriminates against the Plaintiff, a white male, by utilizing the wrong comparison for determining underrepresentation. Although plaintiff maintains that there should be no mandatory FEORP and no mandatory AEP at all, for they are merely thinly disguised quotas, in the alternative, plaintiff submits that a more appropriate comparison might be the percentage of a particular minority/sex group in a category of Federal government employment versus the percentage of that same minority/sex group in the same category of employment in the civilian labor force. The distinction in plain terms is that the percentage of minority/women contract

specialists in DHHS should be compared to the percentage of minority/women contract specialists in the civilian labor force, and not to the percentage of minority/women in the civilian labor force.

The more meaningful comparison identified directly above recognizes that the minority/sex groups at issue in this proceeding must be compared with their counterparts in the civilian labor force who have the requisite knowledge, skills and abilities to perform these tasks. This obviously makes a big difference into whether or not there is even any so called underrepresentation when one considers the facts and reality. Black males are only 3.64% of the GS-1102 contract specialist area civilian labor force, but are 9.9% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, black males are actually overrepresented by a factor of three to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. Similarly black females are only 3.13% of the GS-1102 contract specialist area civilian labor force, but are 14.4% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, black females are actually overrepresented by a factor of over three to one in the agency labor force as compared to the area civilian

labor force in the GS-1102 contract specialist series. White females are 26.57% of the GS-1102 contract specialist area civilian labor force, but are 44.2% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, white females are actually overrepresented by a factor of almost five to three in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. White males are 60.44% of the GS-1102 contract specialist area civilian labor force, but are only 28.1% of the GS-1102 contract specialist agency labor force. Thus were it not for the misrepresentation of underrepresentation, white males are actually underrepresented by a factor of two to one in the agency labor force as compared to the area civilian labor force in the GS-1102 contract specialist series. Thus although 60.44% of the selections made in the agency should be white males, because of the discrimination of affirmative action for minorities and females and the negative action against white males, in a typical year only 14% of the selections made in the agency are white males.

To substantiate the allegation that the present OPM Attachment 1 to FPM Letter 720-2 comparison is meaningless and discriminatory, Plaintiff submits the OPM guidelines themselves which specifically state that:

"It is important to recognize that determinations of underrepresentation made in support of FEORP are based on civilian labor data without regard to the availability of minorities and women in the labor force identified as having (or potentially having) the skills needed to perform in various occupations and pay grades" (emphasis added). See Attachment 1 to FPM Letter 720 - 2.

Thus, persons who do not meet anywhere near even the minimum job requirements, as established in the job vacancy announcements, are not only to be considered in the very definition of underrepresentation, but through the various FEORP and AEP plans are not only wrongfully permitted to be considered for job vacancies, but are actually in effect selected for such positions. Through the various DHHS and NIH affirmative action programs, persons unqualified for the positions identified in this civil suit were in fact both encouraged to apply for, and were in fact actually interviewed for these positions, to the detriment of the Plaintiff. Further, OPM recognized minorities or women were in fact selected as "trainees" for positions, or for comparable openings which were specifically created simultaneously and concurrently, in the eventuality that older white males such as Plaintiff would be rated the most highly qualified on the job openings, and because of that the job vacancies would have to be canceled just so that minorities and women

would nevertheless be selected.

Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program Is Discriminatory ...

OPM guidelines define minorities as "intended to include only the following racial and ethnic categories: American Indian or Alaskan Indian, Asian or Pacific Islander, Black (not of hispanic origin), and Hispanic", in effect all descendants of peoples originating in the continents of North America, Asia, Africa, and South America, except of course descendants of peoples originating in the continent of Europe. See Attachment 1 to FPM Letter 720-2.

Attachment 1 to FPM Letter 720-2 defines the basic racial and ethnic categories as follows:

"(a) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition. (b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes for example, China, Japan, Korea, the Philippine Islands, and Samoa. (c) Black. A person having origins in any of the

black racial groups of Africa. (d) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race."

Attachment 1 to FPM Letter 720-2 further defines Hispanic origin by geographic regions of the United States such that:

"in the five Southwestern States (Arizona, California, Colorado, New Mexico, and Texas), the Hispanic population is identified as Spanish language or surname; in the Middle Atlantic States (New York, Jew Jersey, and Pennsylvania) as the population of Spanish language; and in the remaining 42 States and the District of Columbia, as the population of Spanish language". The FPM Letter provides no basis for its varying definition of Hispanic origin within the 50 states.

City of Richmond v. J.A. Croson Company ...

"When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. Hazelwood School District v. United States, 433 U.S. at 308, n. 13, 97 S.Ct. at 2742 n. 13." (City of Richmond v. J.A. Croson Company, 488 U.S. at 501-502, 109 S.Ct. at 725-726.)

"Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory

exclusion must be the number of minorities qualified to undertake the particular task. See Hazelwood School District v. United States, 433 U.S. at 308, 97 S.Ct. at 2741; Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 651-652, 107 S.Ct. 1442, 1462, 94 L.Ed.2d 615 (1987)." (City of Richmond v. J.A. Croson Company, 488 U.S. at 501-502, 109 S.Ct. at 725-726.)

"To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ... There is absolutely no evidence of past discrimination against Spanish speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. ... The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination. ... The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See Wygant v. Jackson

Board of Education, 476 U.S., at 284, n. 13, 106 S.Ct. at 1852 n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days, "Fullilove", 96 Yale L.J. 453, at 482 ("Such programs leave one with the sense that racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination")." (City of Richmond v. J. A. Croson Company, 488 U.S. at 506-507, 109 S.Ct. at 728-729.)

Relevant Cases Before Adarand ...

WHITE MALE: RACE AND GENDER ...

Adarand Constructors, Inc. v. Pena ...

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal footing." General Contractors v. Jacksonville, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., at ---, 113 S.Ct.,

at 2303. Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2104-2106. ...

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2110-2112. ...

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2112-2114. ...

RELEVANT CASE LAW SINCE ADARAND ...

CONCLUSION

The statutes of 5 U.S.C. §7201 (d), 5 U.S.C. §7201 (a), 5 U.S.C. §7201 (c), the regulations of 5 C.F.R. §720 et seq, Attachment 1 to FPM Letter 720-2, the Federal Equal Opportunity Recruitment Program rules

and guidelines, and the Affirmative Employment Program rules and guidelines, all employ racial classifications and gender classifications and national origin classifications, they therefore should be subject to strict scrutiny. Consequently, the above described laws, regulations, rules, guidelines, and programs employing racial classifications and gender classifications and national origin classifications must be analyzed by this federal court under strict scrutiny. Because the United States is a country of free people whose institutions are founded upon of doctrine of equality, people can be treated differently due to their race or gender or national origin only for the most compelling reasons. Such laws, regulations, rules, guidelines, and programs are constitutional "only if they are narrowly tailored measures that further compelling governmental interests." Because these laws, regulations, rules, guidelines and programs for affirmative action employ racial classifications and gender classifications and national origin classifications which when subjected to and analyzed under strict scrutiny are not narrowly tailored measures that further compelling government interests, they violate the Fourteenth Amendment Equal Protection Clause of the United States Constitution and the Fifth Amendment Due Process Clause of the United States Constitution.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS

Plaintiff

v.

DONNA E. SHALALA, et al.

Defendants

* Civil NO.

* PJM 96-2913

* * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

By letter orders dated June 3 and June 11, 1997, Magistrate Judge Connelly issued certain rulings with regard to pending motions in the captioned case.

Plaintiff Lukacs has filed objections to those rulings. Having considered those objections, the Court finds the rulings not to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

Accordingly, the said objections are hereby OVERRULED and the ORDER is hereby RATIFIED and AFFIRMED.

The Court notes that several motions have been filed in this case. The main motion which the Court intends to consider is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment. The Court in this present Memorandum Opinion has ratified and affirmed the orders of Judge Connelly of June 3 and June 11.

In order to clear a path for consideration of the Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, other than that motion, all other motions presently pending and not ruled upon are hereby DENIED WITHOUT PREJUDICE. To the extend that this case survives the Motion to Dismiss or Summary Judgment and to the extend that the substance of any motions presently denied are not otherwise covered in the Court's ruling on the Motion to Dismiss or for Summary Judgment, they may be revived following the Court's ruling.

In the meantime, the parties are directed to file no further motions until the Court is able to deal with the said Motion to Dismiss or in the Alternative for Summary Judgment.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

June 30, 1997

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1490

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Writ of Mandamus.
(CA-96-2913-PJM)

Submitted: May 14, 1998
Decided: May 27, 1998

Before WIDENER and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Frank Paul Lukacs, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Frank Paul Lukacs filed a petition for a writ of mandamus requesting that this court order the district court: (1) to vacate three of its orders; (2) to permit Lukacs to file pleadings, motions, affidavits, and appeals; (3) to reevaluate his motion for injunctive relief in light of the factors enumerated in Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195-96 (4th Cir. 1977); (4) to specify the court's reasons for denying the motion for injunctive relief; and (5) to grant his motion for permanent injunction against the federal government's affirmative action program. Lukacs raised these issues on appeal and this Court denied relief. See Lukacs v. Shalala, No. 97-2047 (4th Cir. Jan. 26, 1998) (unpublished). In this mandamus petition, Lukacs failed to establish that he has a clear right to the relief sought and that no other remedy is adequate. See In re First Fed. Sav. & Loan Ass'n, 860 F.2d 135, 138 (4th Cir. 1988). Further, mandamus may not be used as a substitute for appeal. See In re United States Steelworkers, 595 F.2d 958, 960 (4th Cir. 1979). We therefore deny Lukacs's petition for a writ of mandamus. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed August 10, 1998
No. 98-1490
CA-96-2913-PJM

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor

CLERK

EXHIBIT O

Docket Number 98-726

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

In Re FRANK PAUL LUKACS,
Petitioner

On Petition for Writ of Mandamus
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF MANDAMUS

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825
Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, does a district court have the power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure, or dismissing and refusing to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP?

II. Did the district court abuse its discretion in denying appellant's motion for a preliminary and permanent injunction on the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP), which is the federal government's so called affirmative action program for minorities and females and hispanics, without ever conducting the appropriate inquiry and analysis and review of the factors regarding motions for injunctive relief of *Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189, 195-96 (4th Cir. 1977), as required in the Fourth Circuit, and without complying with the Federal Rules of Civil Procedure Rule 52(a) which specifically states that "and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action".

APPENDIX P

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

December 7, 1998

Mr. Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143

Re: In Re Frank Paul Lukacs
No. 98-726

Dear Mr. Lukacs:

The Court today entered the following order in the above entitled case:

The petition for a writ of mandamus is denied.

Sincerely,

William K. Suter, Clerk

APPENDIX Q

In re HALLIBURTON COMPANY, Petitioner.
Misc. No. 371.
United States Court of Appeals, Federal Circuit.
March 12, 1993.
S.D. Tex.
VACATED.

Before ARCHER, Circuit Judge, BENNETT, Senior Circuit Judge, and MICHEL, Circuit Judge.
ON PETITION FOR WRIT OF MANDAMUS.

MICHEL, Circuit Judge.
ORDER
1 Halliburton Company petitions for a writ of mandamus directing the United States District Court for the Southern District of Texas to vacate its March 4, 1993 order. Louis J. Wardlaw, III and Joe A. Young oppose.

This matter stems from Wardlaw and Young's patent infringement suit against Halliburton. Following a jury trial, the jury returned a verdict that Wardlaw and Young's patent was not invalid, and Halliburton infringed certain claims of the patent, and that the infringement was willful. The court awarded treble damages and attorney fees and judgment was entered on February 26, 1993.

Halliburton filed a Fed.R.Civ.P. 59(e) motion to alter or amend the judgment.

Halliburton states that it intended to file additional post judgment motions also. The time limit for any party to file any post judgment-motions is March 15, 1993. On March 4, 1993, the district court denied Halliburton's R. 59(e) motion and further ordered that:

"No party in this case file anything further before this Court. The Court will not grant, and is not interested in considering motions to amend judgment, motions for judgment notwithstanding the verdict, motions for a new trial, or any other sorts of motions. The Court is in complete agreement with the substance of the jury verdict, and has ruled regarding all remaining issues in the case. The cost issue has been resolved. This Court must now turn its attention to the some 550 other civil disputes, and more than 40 criminal cases, presently pending on one of the largest dockets in the Country. None of the foregoing filings are required for proper appellate scrutiny, and the filing of anything further in this Court, in the absence of the exhaustion of such appellate scrutiny, will constitute an act of contempt, for which appropriate sanctions will issue."

As Halliburton points out, the Federal Rules of Civil Procedure permit any party to file timely post-judgment motions. Further, this court has stated that the failure to file certain post-judgment motions will result in limited appellate review. *Biodex Corp. v.*

Loredan Biomedical, Inc., 946 F.2d 850, 862 (Fed.Cir. 1992)("Biodex's failure to present the district court with a post-verdict motion precluded appellate review of the sufficiency of the evidence.") Wardlaw and Young's argument that Halliburton filed a lengthy addendum to its proposed judgment does not negate Halliburton's right to file any post-judgment motions authorized by the rules.

Mandamus has traditionally been used to confine a trial court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Gulfstream Aerospace Corp. v. Mayacamas*, 485 U.S. 271, 289 (1988). For example, mandamus has been granted to compel a district court to accept the filing of a motion to extend the time to appeal, *Merritt v. Broglin*, 841 F.2d 184 (7th Cir. 1988), to compel a district court to consider a motion for leave to amend an answer to a complaint, *Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987), and to vacate an order denying both sides right to employ preemptory challenges, *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988).

2 In *Richardson*, the Second Circuit stated that absent extraordinary circumstances, "a [district] court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson*, 825 F.2d at 652. We are in agreement with this principle.

Accordingly,

IT IS ORDERED THAT:

Halliburton's petition is granted. The district court's order is vacated and the district court is directed to allow the filing of motions authorized by the Federal Rules of Civil Procedure.

C.A.Fed.(Tex.), 1993.

In re Halliburton Co.

END OF DOCUMENT

APPENDIX R

SAMPLE AGENCY "FINAL AGENCY DECISION"

Department of Health and Human Services
Public Health Service
National Institutes of Health
Bethesda, Maryland 20892

Certified Mail - Return Receipt Requested
(Certified Mail No. Z 083 489 293)

November 14, 1996

Mr. Frank P. Lukacs
P. O. Box 3143
McLean, Virginia 22103

Re: NIH-013-96

Dear Mr. Lukacs:

On November 1, 1995, the Office of Equal Opportunity received your formal complaint of discrimination. Based on your complaint, the following allegation was identified:

Was Complainant discriminated against based on race, sex, national origin, age, retaliation, and reprisal when his request, dated March 25, 1995, to the Director, National Institutes of Health (NIH) asking him to issue a memorandum to all NIH employees encouraging participation

in the European American Males in Government 1995 First Annual National Training Conference, as was done for the annual national training conference held by the Federally Employed Women and Blacks in Government, was denied?

Your allegation is dismissed from further processing because it fails to state a claim. Equal Employment Opportunity Commission (EEOC) Regulation 29 C.F.R. § 1614.107(a) provides that an agency shall dismiss a complaint or a portion of a complaint that fails to state a personal claim or show harm due to a term, condition, or privilege of employment within the meaning of 29 C.F.R. § 1614.103.

To establish standing as an "aggrieved employee" within the context of 29 C.F.R. § 1614.103, you must allege, first of all, that you have been injured in fact. *Hackett v. McGuire*, 445 F.2d 442 (3rd Cir. 1971). Specifically, you must allege some direct harm that affects a term, condition, or privilege of employment. *See Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). There is no allegation or evidence that you suffered any employment related loss or harm as a result of the Director, NIH, not issuing a memorandum to all employees encouraging them to participate in the conference you were promoting.

Decision

It is the decision of the NIH Office of Equal Opportunity to dismiss your allegation for failure to state a claim.

Notice of Right to Appeal

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, in accordance with 29 C.F.R. § § 1614.402 and 1614.403. Enclosed is a copy of 29 C.F.R. § § 1614.402 and 1614.403 and the following is a summary of your rights and responsibilities under those sections.

Within thirty (30) calendar days of your receipt of this decision, you have the right to appeal this decision by mail to:

Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

or hand deliver to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
1801 L Street N.W.
Washington, D.C. 20507

or send facsimile to:

(202) 690-7022.

You should use EEOC Form 573, Notice of Appeal/Petition (enclosed), and you should indicate what you are appealing. In or attached to the appeal, you must certify the date and method by which service was made on the agency. You must furnish a copy of the appeal to:

Director, Office of Equal Opportunity
National Institutes of Health
Building 31, Room 2B34
31 Center Drive, MSC STOP 2109
Bethesda, Maryland 20892-2109

at the same time that you file the appeal to the Commission. Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the Director, Office of Equal Opportunity, NIH, within thirty (30) calendar days of filing the appeal.

Notice of Right to File a Civil Action

Under 29 C.F.R. § 1614.408, you also have the right to file a civil action in an appropriate United States district court. If you choose to file a civil action, you may do so

-within ninety (90) calendar days of receipt of this decision if no appeal has been filed, or

-within ninety (90) calendar days after receipt of the EEOC's final decision on appeal, or

-after 180 calendar days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

You must name the person who is the official agency head or department head as the defendant. Agency or department means the national organization, and not just the local office, facility, or department in which you might work. Do not name just the agency or department. You must also state the official title of the agency head or department head. In your case, you must name the Honorable Donna E. Shalala, Secretary of Health and Human Services, as the defendant. Failure to provide the name or official title of the agency head or department head may result in dismissal of your case.

If you decide to file a civil action under Title VII or under the Rehabilitation Act and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the

action without payment of fees, costs, or other security. The grant or denial for an attorney does not extend your time in which to file a civil action. Both the request and the civil action **must be filed within ninety (90) calendar days** of the date you receive the Commission's decision.

Sincerely,

Naomi Churchill, Esq.
Director
Office of Equal Opportunity

Enclosures

cc: Hilda Dixon, EEO Officer, OD

APPENDIX S

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY "FINAL EEOC DECISION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O.Box 19848
Washington, D.C. 20036

November 19, 1996

Frank P. Lukacs,
Appellant,
v.
Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Appeal No. 01960502
Agency No. NIH-135-95

FACTS ABOUT FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT PROCESSING REGULATIONS (29 CFR PART 1614)

STATUTES COVERED BY 1614 REGULATIONS

Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate in employment based on race, color, religion, sex, or national origin. ...

RETALIATION / REPRISAL

A person who files a complaint or charge, participates in an investigation or charge, or opposes an employment practice made illegal by any of the above statutes is protected from retaliation.

FILING A COMPLAINT WITH A FEDERAL AGENCY

The first step for an employee or applicant who feels he or she has been discriminated against by a federal agency is to contact an equal employment opportunity counselor at the agency where the alleged discrimination took place within 45 days of the discriminatory action. Ordinarily, counseling must be completed within 30 days. The aggrieved individual may then file a complaint with that agency.

The agency must acknowledge or reject the complaint and if it does not dismiss it, the agency must, within 180 days, conduct a complete and fair investigation.

If the complaint is one that does not contain issues that are appealable to the Merit Systems Protection Board (MSPB), at the conclusion of the investigation, the complainant may request either a hearing by an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ) or an immediate final decision by the employing agency.

The AJ must process the request for a

hearing, issue findings of fact and conclusions of law, and order an appropriate remedy within 180 days.

After the final decision of the agency, the complainant may appeal to the Commission within 30 days or may file in U.S. District Court within 90 days. Either party may request reconsideration by the Commission. The complainant may seek judicial review.

FINAL DEPARTMENT DECISION

"This is to inform you of the Department's decision in regard to the subject complaint of discrimination filed against the National Institutes of Health (NIH).

You allege that you were discriminated against on the bases of age (45), sex (male) and national origin (Hungarian) when on May 11, 1994, senior NIH management officials met on Capitol Hill with members of the National Association for the advancement of Colored People (NAACP), Blacks in Government (BIG), and Congressman Albert Wynn, to discuss NIH's progress on several specific issues since May 1993. ...

First, a review of the Equal Employment Opportunity (EEO) Counseling Report shows that you are complaining about an "invitation only" meeting hosted by Congressman Albert Wynn, which included high level NIH officials and

special interest groups. ...

Further, you indicated to the EEO Counselor that your perception of discrimination derives from your belief that "no members of the European American Males in Government, or anyone at all to represent the views of any European American Males" were included in the meeting. ...

FINAL EEOC DECISION

The final agency decision is AFFIRMED.

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, in accordance with 29 CFR §1614.402 and §1614.403.

§1614.402 Time for Appeals to the Commission ...

§1614.403 How to Appeal ...

You have the alternative of seeking judicial relief by filing a civil action in an appropriate U.S. District Court within ninety (90) calendar days after receipt of this notice of final decision. Please note: If you file a notice of appeal with the Commission, the right to file a civil action

will be preserved. In that case, you may file a civil action within ninety (90) calendar days after receipt of the Commission's decision; or, if the commission has not issued its decision, 180 calendar days after the date the Office of Federal Operations accepted the appeal.

If you elect to file a civil action, you must name as the defendant, the Honorable Donna E. Shalala, Secretary of the Department of Health and Human Services. Failure to name the Secretary may result in the loss of any judicial redress to which you may be entitled. You are further advised that you may appeal to a U.S. District Court for appointment of an attorney to represent you in any court proceedings relating to this decision. The court may appoint an attorney to represent you and may permit commencement of a court action without payment of fees, costs, or security.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0795)

The commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the

previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date of this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating

circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (S0993)

It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL

NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § § 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to tile a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION
Signature of Ronnie Blumenthal

_____

Ronnie Blumenthal, Director
Office of Federal Operations

APPENDIX T

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY "FINAL EEOC DECISION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O.Box 19848
Washington, D.C. 20036

Frank P. Lukacs,
Appellant,

v.

Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Appeal No. 01962294
Agency No. NIH-279-95

DECISION

Appellant alleges that the agency discriminated against him on the bases of his race (White), sex (male), and national origin (Czechoslovakia) when the agency's Office of Equal Employment Opportunity changed the name of its publication from NIH OEO Digest to the Diversity Digest. The agency dismissed the

complaint on the ground that the complainant failed to allege that he suffered any personal harm or loss as a result of this change in name. For the following reasons, we AFFIRM the FAD.

The appellant's complaint is based on a misconceived notion that a mere change in the name of the agency's digest from "OEO" to "Diversity" signals a change in the agency's employment policy to provide an equal employment opportunity to white males. He claims that the "name change is merely symptomatic and exemplary of the entire philosophical and practical implications of the entire now misdirected self perceived mission of the NIH Office of Equal Employment Opportunity, a radical shift away from equal employment opportunity for all, including white males, to that of unequal employment opportunity, excluding white males." (Errors, omissions, and emphasis, in original.) Other than this claim of a symptomatic problem, the appellant fails to allege that he has in fact been denied any job opportunity on an alleged discriminatory basis. Moreover, the appellant mistakenly believes that the word "diversity" means "inequality". Besides, regardless of the name given to an agency publication, all agency employees, including the appellant, remain entitled to equal employment opportunities by law.

We, therefore, AFFIRM the FAD.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0795)

The commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date of this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST

be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (S0993)

It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be

aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights

Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § § 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to tile a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION

Signature of Ronnie Blumenthal

Ronnie Blumenthal, Director
Office of Federal Operations

December 18, 1996

DATE

APPENDIX U

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY
"FINAL EEOC DECISION
ON REQUEST FOR RECONSIDERATION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

Frank P. Lukacs,
Appellant,
v.
Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Request No. 05960388
Appeal No. 01952863
Agency No. NIH 027-95

At the time appellant filed his EEO complaint in 1994, he was a Technology and Development Patent Specialist, GS-301-14. He has a Juris Doctor degree. In his complaint, appellant alleged the he was subject to racial, (white), national origin (European), sex (male), and age (DOB 06/27/49) discrimination when he read an article in the November 23, 1993 edition of *The Record*, an agency publication, describing

a training grant program to provide research training opportunities abroad for minority university students to stimulate interest in biomedical and behavioral research careers, and for minority faculty to conduct research in institutions abroad. Appellant alleged that there had been a hiring and promotion freeze at the GS-13, GS-14, and GS-15 levels, and money spent on the grant program could have been spent on this and for training everyone, creating opportunities for all employees. ...

RIGHT TO FILE A CIVIL ACTION (S0993)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court. **It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision.** You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR

DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. § § 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to tile a civil action. Both the request and the civil action must be filed within the time

limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION

Signature of Frances M. Hart

_____

Executive Officer
Executive Secretariat

June 19, 1997

_____

DATE

APPENDIX V

SAMPLE DEPARTMENT "FINAL AGENCY DECISION"

Department of Health and Human Services
Office of the Secretary
Washington, D.C. 20201

Certified Mail - Return Receipt Requested

August 28, 1997

Mr. Frank P. Lukacs
P. O. Box 3143
McLean, Virginia 22103

Re: File Number OEO-126-95,
OEO-148-95 and OEO-036-96
DOF: 03/04/96

Dear Mr. Lukacs:

This is to inform you of the Department's final decision on the subject Equal Employment Opportunity (EEO) complaint filed against the National Institutes of Health (NIH).

You alleged that you were discriminated against on the basis of your prior EEO activity when you were required to provide a doctor's certificate for **one day** of sick leave; on the bases of your prior EEO activity, age (dob 06/27/49), race (White),

sex (male) and national origin (Czechoslovakian/European), when the Agency issued you a **Performance Counseling Memorandum**. ...

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, in accordance with 29 CFR §1614.402 and §1614.403.

§1614.402 Time for Appeals to the Commission ...

§1614.403 How to Appeal ...

You have the alternative of seeking judicial relief by filing a civil action in an appropriate U.S. District Court within ninety (90) calendar days after receipt of this notice of final decision. Please note: If you file a notice of appeal with the Commission, the right to file a civil action will be preserved. In that case, you may file a civil action within ninety (90) calendar days after receipt of the Commission's decision; or, if the commission has not issued its decision, 180 calendar days after the date the Office of Federal Operations accepted the appeal.

If you elect to file a civil action, you must name as the defendant, the Honorable Donna E.

Shalala, Secretary of the Department of Health and Human Services. Failure to name the Secretary may result in the loss of any judicial redress to which you may be entitled. You are further advised that you may appeal to a U.S. District Court for appointment of an attorney to represent you in any court proceedings relating to this decision. The court may appoint an attorney to represent you and may permit commencement of a court action without payment of fees, costs, or security.

FOR THE DEPARTMENT:

Sincerely,

John J. Callahan
Director
Equal Employment Opportunity

cc: Director, EEO, NIH

APPENDIX W

SAMPLE US EQUAL EMPLOYMENT OPPORTUNITY "DOCKETING OF EEOC REQUEST FOR RECONSIDERATION"

U. S. Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

July 30, 1997

Frank P. Lukacs,
Appellant,
v.
Donna E. Shalala,
Secretary,
Department of Health and Human Services
National Institutes of Health,
Agency.

Docket No.	05970934
Appeal No.	01970870
Agency No.	NIH 344-91
	NIH 120-92

Your request for reconsideration has been docketed and assigned the docket number listed above. Please refer to the docket number on all correspondence to this office.

Parties may request reconsideration

provided that such request is made within thirty (30) calendar days of receipt of a decision issued pursuant to Section 1614.407. The opposing party has twenty (20) calendar days from their receipt of the request to reconsider to submit comments or opposition brief. Requests for reconsideration shall be submitted to the Office of Federal Operations. Copies of all documents submitted to this office must also be submitted to the opposing party since this office will not do so.

(From EEOC decision on which request to reconsider was based:

At the time appellant sought EEO counseling on his complaints he worked for the agency as a contract specialist, GS-1102-12. He has a Juris Doctor degree.

In complaint NIH 344-91, appellant alleged that he was discriminated against on the bases of age (41) and national origin (Czechoslovakia) when the agency used rating criteria to evaluate his applications for two positions that did not give credit for his undergraduate, graduate, and professional education. The positions in question were contract specialist, GS-1102-11/12 and 9/11/12. They were advertised under vacancy announcements OD-90-0395 and CA-91-0014A, which closed in January 1991 and February 1991.

Under complaint NIH 120-92, the agency consolidated what appeared to be three informal complaints by appellant into one formal complaint. The agency defined the complaint in a final decision that dismissed part of the complaint. The complaint as defined, alleged that appellant was discriminated against on the bases of age, national origin, and reprisal for EEO activity, as applicable, when: (1) he learned in April 1991 that he was not selected for the position of contract specialist under vacancy announcement CA-91-0014A, (2) he learned in April 1991 that he was not selected for the position of contract specialist under vacancy announcement OD-90-0395, (3) he was informed that he would not be permitted to attend a one week course, entitled Federal Contract Law, for which he was scheduled commencing April 1991, (4) the agency used rating criteria for the position of contract specialist, GS-1102-12/13, under vacancy announcement DK-91-0490 (Footnote 1: The announcement closed in May 1991) that precluded appellant from being considered for the position, and (5) the agency used rating criteria for the position of contract specialist, GS-1102-12/13 under vacancy announcement OD-91-0063 (Footnote 2: The announcement closed in April 1991) that precluded him for being considered for the position.

Appellant appealed the above referenced final

agency decision to the Commission. Other than stating that his complaint also alleged discrimination on the bases of his race (white) and sex (male), appellant did not contest the agency's characterization of complaint NIH 120-92 in that appeal. In its appeal decision, the Commission characterized the allegations in complaint NIH 120-92 as set forth by the agency. The Commission reversed the agency's procedural decision. (Footnote 3: Lukacs v. Department of Health and Human Services, EEOC Appeal No. 01922704 (January 12, 1993).) Appellant did not request the Commission to reconsider its appeal decision. Thereafter, the agency issued a merits decision finding no discrimination on allegations 4 and 5 of complaint NIH 120-92. In its appeal decision, the Commission vacated the agency's final decision. According to the Commission's decision, appellant contended on appeal that allegations 4 and 5 did not concern whether he was properly precluded from those positions under agency rating criteria, but whether the rating criteria itself was discriminatory. The Commission ordered the agency, among other things, to process allegations 4 and 5 and to clarify each issue in the complaint. (Footnote 4: Lukacs v. Department of Health and Human Services, EEOC Appeal No. 01932116 (August 25, 1995).) Appellant did not request the Commission to reconsider its appeal decision.

On remand, the agency advised appellant that it would investigate complaint NIH 344-91 and allegations 4 and 5 of complaint NIH 120-92. The agency previously accepted allegations 1, 2, and 3 of complaint NIH 120-92, but did not explain the status of these allegations. ...

On appeal, appellant states that complaint NIH 120-92 contains allegations that were ignored. Appellant refers to one of the three apparent informal complaints written in May 1991 of which NIH 120-92 is comprised. Appellant observed this complaint contained allegation 3. He also avers it alleged reprisal discrimination for EEO activity when he was told that he would not receive another performance appraisal with the rating of "excellent" or get a promotion. A reading of this complaint reveals its thrust concerns allegation 3, but it also mentioned the latter matters. ...

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0795)

The commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available

that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date of this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).)

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*Decemb. 11, 1997
	*Civil Action #s
FRANK PAUL LUKACS	*PJM-97-379
	*PJM-97-3359
Plaintiff	*PJM-97-3483
	*PJM-97-3495
v.	*
	*
DONNA E. SHALALA, et al.	*
	*
Defendants	*Septem. 08, 1998
	*Civil Action #
* * * * * * * * * * * * * * *	*PJM-96-2913

PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3495 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Plaintiff respectfully submits this motion for consolidation of PJM-96-2913 filed on 09/17/96, and PJM-97-0379 filed on 02/06/97, and PJM-97-3359 filed on 10/03/97, and PJM-97-3483 filed on 10/17/97, and PJM-97-3495 filed on 10/20/97, with all of the preceding civil actions being captioned Frank Paul Lukacs Plaintiff Versus Honorable Donna E. Shalala Et Al Defendants, and all of the preceding civil actions presently pending before United States District Court Judge Peter J. Messitte in the United States District Court for the District of Maryland.

The reasons for this motion to consolidate are set forth in the accompanying memorandum.

Respectfully submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*Decemb. 11, 1997
	*Civil Action #s
FRANK PAUL LUKACS	*PJM-97-379
	*PJM-97-3359
Plaintiff	*PJM-97-3483
	*PJM-97-3495
v.	*
	*
DONNA E. SHALALA, et al.	*
	*
Defendants	*Septem. 08, 1998
	*Civil Action #
* * * * * * * * * * * * * * *	*PJM-96-2913

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3495 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Federal Rules of Civil Procedure Rule 42. Consolidation; Separate Trials states that "(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.". ...

If anyone has bothered reading that which Plaintiff has filed, it should be obvious that Plaintiff has challenged several so called affirmative action programs, or rather affirmative discrimination programs, while employed as a civil servant in the in the United States federal government, and with some of the common issues of fact presented, part of the common issue of law becomes whether any of these inherently discriminatory programs under the strict scrutiny test which demands narrowly tailored measures that further a compelling government interest are illegal or unconstitutional. "Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly

tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114. Unfortunately, the filing of equal employment opportunity complaints of discrimination challenging the legality and constitutionality of such discrimination resulted in numerous instances of retaliation, reprisal, harassment, the creation of a hostile working environment, and the eventual constructive discharge of Plaintiff. ...

"The common question standard has a long history, figuring in such landmark decisions as *Mutual Life Ins. Co. v. Hillmon*, where the Supreme Court made an order consolidating three separate lawsuits regarding the death of an insured, because the actions were "of like nature and relative to the same question." The Court justified its decision as one calculated to "avoid unnecessary cost and delay". *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892) (landmark Supreme Court consolidation case involving dispute over life insurance policies)." 8 *Moore's Federal Practice*, § 42.10 [1] [a] (Matthew Bender 3d ed. 1997). ...

"A common factual issue, such as two lawsuits pending in the same court and brought by the same plaintiff, is a sufficient basis for consolidation if combining the two cases

will simplify the litigation process. Especially if the alternative (to dismiss the second lawsuit and require the plaintiff to amend its first complaint to add the dismissed allegations) would be a complicated exercise of form over substance, consolidation is generally preferred. ***Hanes Cos. v. Ronson,*** **712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (court found consolidation of two cases filed by same plaintiff "enhanced efficiency and economy for all concerned")." 8** ***Moore's Federal Practice,*** **§ 42.10 [1] [c] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Multiple Filings by One Plaintiff May be Consolidated".**

"The broad managerial power of the district court to consolidate extends to the consolidation of cases where no motion has been brought. A trial court has the power sua sponte to hold a hearing to determine whether the actions then pending before it should be consolidated. *Katz v. Realty Equities Corp. of N. Y.*, 521 F.2d 1354, 1356 (2d Cir. 1975) (court held hearing to determine consolidation). ***Miller v. United States Postal Service,*** **729 F.2d 1033, 1036-1037 (5th Cir. 1984) (appellate court remanded cause with instructions to district court to consolidate two cases for trial.) No motion was pending." 8** ***Moore's Federal Practice,*** **§ 42.10 [2] [b] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Broad Discretion Extends to Power to Consolidate Sua Sponte".**

"Even when the parties or issues of law are not identical, courts may, without any motion pending (such as in cases involving pro se plaintiffs with claims against the United States), find a commonality of law or fact and consolidate a case with other pending cases. Consolidation sua sponte when cases are similar, not identical. *Capps v. Eggers*, 782 F.2d 1341, 1342 (5th Cir. 1986) (court consolidated pro se taxpayer's lawsuit with other similar lawsuits pending in same court)." 8 *Moore's Federal Practice*, § 42.10 [2] [b] [iv] (Matthew Bender 3d ed. 1997) under section entitled "Broad Discretion Extends to Power to Consolidate Sua Sponte".

...

Here there has been no discovery, and barring a favorable appeals court intervention, there will probably never be any discovery, despite all of the many genuine issues of material fact, just as much as there has never been any of the mandatory formal independent investigations of the equal employment opportunity complaints according to 29 C.F.R. 1614, which is just one more of the many common issues of law or fact, for discovery of the real facts, or even a formal independent investigation of the equal employment opportunity complaints according to 29 C.F.R. 1614, is the very last thing that people who favor affirmative discrimination

want, or for all of their talk of tolerance are themselves least willing to tolerate, for the real facts may just prove that affirmative action is in fact nothing but a very thinly disguised form of actual discrimination. ...

"Consolidation of separate actions presenting a common issue of law or fact is permitted under Rule 42 as a matter of convenience and economy in judicial administration. ... Although the public employee's initial employment discrimination action under Section 2000 e et seq. of Title 42 and his subsequent action alleging removal from employment for constitutionally impermissible reasons arose out of the same set of facts and sought basically the same relief, the district court erred in dismissing the second action on the ground that the earlier suit arose from the same set of facts. The proper solution would have been to consolidate the two separate actions in the interests of equity and judicial economy. *Miller v. U.S. Postal Serv.*, C.A.5th, 1984, 729 F.2d 1033." 9 *Wright & Miller, Federal Practice and Procedure*: Civil 2d § 2383 (1995), text plus footnote 1 case. ...

"The pendency of an earlier action in the same federal district court was not a ground for dismissal of a subsequently instituted action that was alleged to be based on a cause

of action identical to that in the pending action against the same defendants, and the proper solution would be to consolidate those actions. *Thomas v. Deason*, D.C.Ky. 1970, 317 F.Supp. 1098, 1099." 9 *Wright & Miller, Federal Practice and Procedure*: Civil 2d § 2383 (1995), footnote 1 case. ...

"Although identity of the parties strengthens the case for consolidation under Rule 42 (a) it is not required. A substantial common question of law or fact is enough. If an appropriate common question exists, courts often have consolidated actions despite differences in the parties. ... Civil rights action challenging the racial discrimination in the allocation of park resources was consolidated for trial with an action charging racial discrimination in the allocation of park resources as well as employment discrimination in the park district when the parties and claims were essentially the same, the subject matter was the same, and the common issue was whether the defendants were administering the park system in a racially discriminatory manner. *Midwest Community Council, Inc. v. Chicago Park Dist.*, D.C.Ill. 1983, 98 F.R.D. 491." 9 *Wright & Miller, Federal Practice and Procedure*: Civil 2d § 2384 (1995). ...

Let us take a simplified hypothetical case, omitting a lot of details for our

present purposes of illustration.

1 Suppose a white male plaintiff timely files an individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number one, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

2 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number two, on the denial of some benefits because he is a white male, with that same benefit however being given to minorities and females.

3 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number three, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

4 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29

C.F.R. § 1614, designated as EEO number four, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

5 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number five, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

6 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number six, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

7 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number seven, on perhaps his nonselection for another affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

8 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number eight, on perhaps retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

9 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number nine, on perhaps additional retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

10 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number ten, on perhaps additional retaliation and reprisal and retaliatory constructive discharge for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative

action programs.

I Then a few months later, or even a few years later, plaintiff having met the procedural time requirements of 29 C.F.R. § 1614 on his fifth individual equal employment complaint, finally files a complaint in federal court, on his fifth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say September 17, 1997, with the civil action number being, let us say hypothetically PJM-96-2913. Plaintiff files his first complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on his nonselection for an affirmative action designated job vacancy announcement with the position having been filled by a less qualified minority or female, as well as challenging the constitutionality of the so called affirmative action statutes, regulations, rules, and procedures.

II Then a few months later, let us say on November 14, 1996, the agency issues a final decision on plaintiff's fourth individual equal employment opportunity complaint. Plaintiff now only has ninety days in which to file a complaint in federal court on his fourth equal employment opportunity complaint. Then later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's second individual equal employment opportunity complaint, let us say on November 19, 1996.

Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. Then the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's third individual equal employment opportunity complaint, let us say on December 18, 1996. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. With the first of the three ninety days almost having expired, plaintiff quickly files a complaint in federal court, on his second equal employment opportunity complaint, on his third equal employment opportunity complaint, and on his fourth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say February 06, 1997, with the civil action number being let us say hypothetically PJM-97-379. Plaintiff files his second complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of a benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379. However because of the procedural requirements for filing a civil

action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-379 until November 14, 1997 and had to have filed by February 14, 1997.

III Then a few months later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's sixth individual equal employment opportunity complaint, let us say on July 08, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his sixth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say October 03, 1997, with the civil action number being let us say hypothetically PJM-97-3359. Plaintiff files his third complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3359 until July 08, 1997 and had to have filed by October 08, 1997.

V Then a few months later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's eighth individual equal employment opportunity complaint and plaintiff's ninth individual equal employment opportunity complaints, let us say on July 16, 1997, with the agency adopting the EEOC decision as its own agency final decision on August 28, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his eighth and ninth and tenth equal employment opportunity complaints, and let us for the sake of argument pick a date, any date, say October 20, 1997, with the civil action number being let us say hypothetically PJM-97-3495. Plaintiff quickly files his fifth complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age as well as claims for retaliation and reprisal, with the retaliation and reprisal serving as additional evidence of plaintiff's claim of retaliatory constructive discharge. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until August 28, 1997, but had to have filed

by November 28, 1997.

VI or III Then a few months later, after having been to the Equal Employment Opportunity Commission four times on plaintiff's first individual equal employment opportunity complaint, plaintiff has a window of opportunity to finally file a civil action in an appropriate United States District Court. Plaintiff in not wanting to file another federal court complaint instead chooses to amend his third federal court complaint PJM-97-3359 with the contents of his first equal employment opportunity complaint on let us say May 27, 1998. Plaintiff now has some additional common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until February 1998.

VII Etcetera.

(Added to this scenario is the fact that plaintiff's first federal court complaint PJM-96-2913 was physically up on appeal at the Fourth Circuit Court of Appeals for most of this time, not to mention that the district court had ordered the parties not to file any motions, and later not to file any pleadings, thereby preventing plaintiff-appellant from amending or supplementing his first federal court complaint.)

Since there are several common questions of law or fact plaintiff files a motion to consolidate. The court however without any explanation or comment at all decides that there are no common questions of law or fact and denies the motion to consolidate. The court instead dismisses plaintiff's PJM-97-379 and PJM-97-3359 and PJM-97-3495 federal court complaints, for although there are supposedly no common questions of law or fact, the court finds them to be duplicative of claims, whatever that means.

One of the problems with this totally incorrect analysis is that the court is totally ignoring the simple fact that it was the very limited time frames in which plaintiff had to file federal court complaints which resulted in the several federal court complaints in the first place, and which now prevents the district court, apart from the district court first employing the procedure of consolidation, from acting on plaintiff's federal court complaints all at once for the stated reasons.

So much for hypotheticals. Unfortunately, the preceding hypothetical is basically what really happened in the United States District Court for the District of Maryland in PJM-96-2913, PJM-97-379, PJM-97-3359, and PJM-97-3495.

So now what is really going on. Plaintiff posits that with plaintiff being a white male who is challenging so called

affirmative action programs for minorities and females, and with the district court judge having been appointed by President Clinton who is the biggest public supporter of so called affirmative action programs for minorities and females, the reality of the matter is that this court is obviously going to do everything it can to make sure that defendants do not lose and correspondingly that plaintiff does not win. ...

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*01/06/98
	*PJM-97-3359
FRANK PAUL LUKACS	*
	*01/06/98
Plaintiff	*PJM-97-3483
	*
v.	*05/21/98
	*PJM-97-3495
DONNA E. SHALALA, et al.	*
	*08/24/98
Defendants	*PJM-97-379
	*
	*08/27/98
	*PJM-97-3359
	*
	*10/08/98
* * * * * * * * * * * * * * *	*PJM-96-2913

PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE RULE 55

Plaintiff respectfully submits this motion for judgment by default according to Federal Rules of Civil Procedure Rule 55.

The reasons for this motion for judgment by default are set forth in the accompanying memorandum.

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *	*08/19/98
	*
FRANK PAUL LUKACS	*Civil Action #
	*
Plaintiff	*PJM-96-2913
	*
v.	*
	*
DONNA E. SHALALA, et al.	***AMENDED**
	*
Defendants	***PLEADING**
	*
* * * * * * * * * * * * * * *	*

PLAINTIFF'S AMENDED PLEADING

ONCE AS A MATTER OF COURSE

BEFORE A RESPONSIVE PLEADING

HAS BEEN SERVED

APPENDIX BB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*
Plaintiff	*09/01/98
v.	*Civil Action #
DONNA E. SHALALA, et al.	*PJM-96-2913
Defendants	*

* * * * * * * * * * * * * * * *

Motion for Enlargement of Time
to Respond to Amended Complaint

Defendants, by and through their attorneys, Lynne A. Battaglia, United States Attorney for the District of Maryland, and Earle B. Wilson, Assistant United States Attorney, for said District, respectfully move for an enlargement of time to answer, move, or otherwise plead to plaintiff's amended complaint ...

At the same time that the Court denied plaintiff's motions, it directed that the parties file no further motions. ...

Plaintiff does not consent to this motion. Wherefore, the United States prays for an order extending through and including September 30, 1998 for all of the defendants to answer, move, or otherwise plead to plaintiff's amended complaint.

Respectfully Submitted

Lynne A. Battaglia
United States Attorney

by: Signature of Earle B. Wilson

Earle B. Wilson #24414
Assistant U.S. Attorney
6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21202-2692
(410) 209-4827

APPENDIX CC

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770

Mailed September 02, 1998

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143

Re: Case No. PJM-96-2913

Dear Mr. Lukacs:

The Clerk received your "Amended Complaint" on 8/19/98; however, it is deficient in the areas checked below:

A "Motion for Leave to File an Amended Complaint" and proposed Summonses prepared in blank is required, (in duplicate).

The Clerk is directed to return the above paper(s) to counsel.

Very truly yours,
Signature of Peter J. Messitte, Jr.

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX DD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 74**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MOTION FOR CONSOLIDATION OF PJM-96-2913 FILED ON 09/17/96 AND PJM-97-0379 FILED ON 02/06/97 AND PJM-97-3359 FILED ON 10/03/97 AND PJM-97-3483 FILED ON 10/17/97 AND PJM-97-3495 FILED ON 10/20/97, WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPENDIX EE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 74**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR CONSOLIDATION
OF PJM-96-2913 FILED ON 09/17/96
AND PJM-97-0379 FILED ON 02/06/97
AND PJM-97-3359 FILED ON 10/03/97
AND PJM-97-3483 FILED ON 10/17/97
AND PJM-97-3495 FILED ON 10/20/97,
WITH ALL OF THE PRECEDING CIVIL ACTIONS BEING CAPTIONED FRANK PAUL LUKACS PLAINTIFF VERSUS HONORABLE DONNA E. SHALALA ET AL DEFENDANTS AND ALL OF THE PRECEDING CIVIL ACTIONS PRESENTLY PENDING BEFORE DISTRICT COURT JUDGE PETER J. MESSITTE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPENDIX FF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 75**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT "ONCE AS A MATTER OF COURSE BEFORE A RESPONSIVE PLEADING HAS BEEN SERVED"

Plaintiff respectfully submits this motion for leave to file an amended complaint "once as a matter of course before a responsive pleading has been served".

The reasons for this motion are set forth in the accompanying memorandum.

APPENDIX GG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*September 08, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 75**
	*
Defendants	*September 08, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT ONCE AS A MATTER OF COURSE BEFORE A RESPONSIVE PLEADING HAS BEEN SERVED

"A PARTY MAY AMEND THE PARTY'S PLEADING ONCE AS A MATTER OF RIGHT BEFORE A RESPONSIVE PLEADING IS SERVED"

Defendants to date have not submitted a "responsive pleading".

"Federal Rules of Civil Procedure Rule 15 states that

"(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires**. A party shall plead in response to an amended pleading within the time remaining for service to the original pleading or within 10 days after service of the amended pleading, wherever period may be longer, unless the court orders otherwise."

Defendants to date have not submitted a "responsive pleading".

Plaintiff tried to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served" as per FRCP Rule 15 (a) Amendments with a verified pleading.

"The rule allows for liberal amendments in the interests of resolving cases on the merits." 3 Moore's Federal Practice, § 15.02

[1] (Matthew Bender 3d ed.). **It is entirely contrary to the spirit of the Rules for decisions on the merits to be avoided on the basis of technicalities**, *Foman v. Davis*, 371 U.S. 178, 181-182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). **When plaintiff asserts a claim, even if inartfully stated, the Rules require that plaintiff be given an opportunity to have the claim considered on the merits**, *Doussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981). The court's discretion to dismiss claim without leave to amend is limited by direction of Rules to amend where justice requires, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). **The pleadings are not a game of skill in which "one misstep by counsel may be decisive to the outcome"**, *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

"A party is allowed to amend a pleading once "as a matter of course" or without leave of court", 3 Moore's Federal Practice, § 15.10 (Matthew Bender 3d ed.). **The district court erred in refusing to allow an amended complaint to add a First amendment claim because defendants never filed a responsive pleading and only filed a motion to dismiss for failure to state a claim**, *Caine v. Hardy*, 905 F.2d 858, 863 (5th Cir. 1990). **Since defendants had not filed a responsive pleading, plaintiff had a right to amend on remand**, *Schiffels v. Kemper Fin. Serv., Inc.*,

978 F.2d 344, 353-354 (7th Cir. 1992). **The court improperly denied leave when plaintiff was under no obligation to ask for leave because defendant had not filed responsive pleading**, *Stewart v. [illegible] Corp.*, 790 F.2d 624, 631 (7th Cir. 1986). **Order denying amendment was improper when plaintiff may amend once without leave, and it is irrelevant that leave was not requested**, *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). **Plaintiff was allowed to amend once without leave, since only filing by defendant was motion to dismiss and to compel arbitration, which was not responsive pleading**, *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659-660 (11th Cir. 1987).

"A party may amend a pleading as a matter of course at any time before a responsive pleading is filed. ... the filing of a Rule 12(b) defense extends the time for filing an answer". 3 Moore's Federal Practice, § 15.11 (Matthew Bender 3d ed.). **If the time for serving a responsive pleading is extended, then the right to amend is extended**, *Prudential Sec. Ltd. Partnership Litig.*, 158 F.R.D. 562, 567-568 (S.D.N.Y. 1994). **Motion to dismiss is not a responsive pleading so the right to amend was not cut off and the district court was obligated to review the amended complaint**, *Hill v. City of Indianapolis*, 17 F.3d 1016, 1018 (7th Cir.

1994). **The right to amend is terminated only by a responsive pleading**, *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995), *Mayes v. Leipsiger*, 729 F.2d 605, 607 (9th Cir. 1984). **The right to amend was not cut off because no responsive pleading was filed**, *Fox v. Sierra Dev. Co.*, 876 F.Supp. 1169, 1170-1171 (D. Nev. 1995). **The court improperly denied leave because the plaintiff had a right to amend the complaint since no responsive pleading had been filed**, *Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993).

"The term responsive pleading is defined by reference to Rule 7(a), which distinguishes between pleadings and motions, and provides an exclusive list of what is a pleading: a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint, and an answer. Pre-trial motions attacking the pleadings or seeking relief as to collateral matters are not responsive pleadings. Accordingly if no responsive pleading has been filed, the filing of these motions does not cut off a plaintiff's right to amend as a matter of course. Examples of pre-trial motions include: motions to dismiss, motions for summary judgment, motions for a more definitive statement under Rule 12, motions for production and inspection, and motions to quash service." 3 Moore's Federal Practice,

§ 15.11 (Matthew Bender 3d ed.). The court allowed the amendment and specified the types of pre-trial motions that did not constitute responsive pleadings, *Kroger Co. v. Adkins Transfer Co.*, 284 F.Supp. 371, 374 (D.C. Tenn. 1968). **A motion to dismiss and compel arbitration was not a responsive pleading**, *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 659 (11th Cir. 1987). **A motion to dismiss is not a responsive pleading and order dismissing complaint does not cut off the right to amend**, *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995). **At the time of dismissal, defendant had not yet filed a responsive pleading, so plaintiff had a right to amend once as a matter of course**, *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344, 353-354 (7th Cir. 1992). **A motion to dismiss is not a responsive pleading**, *Miles v. Dep't of Army*, 881 F.2d 777, 781 (9th Cir. 1989). **When defendants only filed a motion to dismiss, plaintiff was entitled to amend as of right because it is well established in circuit that motion is not responsive pleading**, *Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993). **Neither motions for summary judgment nor dismissal are responsive pleadings**, *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984). **Court should have granted proposed amendment because no responsive pleading was filed**, *Ross v. Franzen*, 777 F.2d 1216, 1222 (7th Cir. 1985)."

"**One amendment is permitted of course before a responsive pleading is filed.** *Coral v. Gonse*, 330 F.2d 997 (4th Cir. 1964); *Wallace v. Chrysler Credit Corp.*, 743 F.Supp. 1228 (W.D. Va. 1990)." "**Motions to dismiss and for summary judgment are not considered responsive pleadings for purposes of subdivision (a) of this rule.** *Williams v. Wilkerson*, 90 F.R.D. 168 (E.D. Va. 1981)." "**Motions to dismiss and motions for summary judgment are not treated as responsive pleadings under this rule.** *United States ex rel. Tucker v. Thomas Howell Kiewit (USA) Inc.*, 149 F.R.D. 125 (E.D. Va. 1993)." "**Where defendants did not file an answer to plaintiff's original complaint, but rather filed motions to dismiss, such pre-answer Rule 12(b) motions not being responsive pleadings, plaintiff was not required to obtain leave of court before filing his amended complaint.** *Sohns v. Dahl*, 392 F.Supp. 1208 (W.D. Va. 1975)."

"**Federal Rules of Civil Procedure Rule 15 states that**

"**(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served** or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial

calendar, the party may so amend it at any time within 20 days after it is served. Otherwise **a party may amend the party's pleading** only by leave of court or by written consent of the adverse party; **and leave shall be freely given when justice so requires**. A party shall plead in response to an amended pleading within the time remaining for service to the original pleading or within 10 days after service of the amended pleading, wherever period may be longer, unless the court orders otherwise."

"After a responsive pleading has been filed, a party may amend the pleading only with leave of court or written consent of the adverse party. Although the ability to amend a pleading is not automatic and requires court approval, a district judge should freely grant leave to amend when justice requires, absent a substantial reason to deny. **A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a).**" 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.).

"The text of Rule 15(a) is unequivocal regarding the requirement that leave to amend be liberally granted. The policy that a court should freely grant amendments limits a court's ability to deny leave to amend, and in a proper case, may warrant a finding of abuse of discretion in denying leave. During the pretrial phase, a court should allow

amendments to ensure that all the issues are before the court." 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.). The court's discretion to deny leave is limited by the procedural rule promoting amendment, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

"Under *Foman v. Davis* it is an abuse of discretion if the district court refuses to grant leave to amend without giving any reason." 3 Moore's Federal Practice, § 15.14 [1] (Matthew Bender 3d ed.). Courts should freely grant leave to amend, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). **If court lacks substantial reason to deny leave, discretion is not broad enough to permit denial**, *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1303 (5th Cir. 1995).

"The leading case regarding the trial court's exercise of discretion to deny amendment is *Foman v. Davis*. In *Foman*, the Supreme Court asserted that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." After the *Foman* decision, it is clear that a trial court must provide a reason for denying a motion to amend. The *Foman* decision also clarified the factors that a district judge may use to deny

leave to amend. These factors include: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment." 3 Moore's Federal Practice, § 15.15 [1] (Matthew Bender 3d ed.).

Defendants have not even bothered bringing up any of these factors, probably because they simply do not exist, as there has been no undue delay, no bad faith or dilatory motive on the part of the movant, no repeated failure to cure deficiencies by amendments previously allowed, no undue prejudice to the opposing party, and no futility of the amendment.

Courts should heed the mandate of Rule 15(a) that leave be freely given when justice requires, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). Leave to amend must be freely given when justice requires, *Subaru Distribs. Corp. v. General Ship Corp.*, 167 F.R.D. 342, 343 (D. Mass. 1996). Court normally grants leave, *Merney v. Valante & Sons Repair Shop*, 66 F.3d 25, 28 (2 Cir. 1995). Courts prefer to permit amendments, *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 235 (2d Cir. 1995). **Court erred in denying leave to amend complaint because it did not constitute a short and plain statement as required by Rule 8**, *Salahuddin v. Cuomo*, 861 F.2d 40, 42-43 (2d Cir. 1988). Leave should be freely given,

Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1464 (5th Cir.). **Court should freely grant leave to amend, especially with pro se plaintiff**, *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 103 (5th Cir. 1995). Liberal standards are applicable to motions for leave to amend, *Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180-1181 (7th Cir. 1992). Court should grant leave, *Frey v. City of Herculaneum*, 44 F.3d 667, 672 (8th Cir. 1995). District courts routinely grant leave to amend, *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1405 (11th Cir. 1994).

"Courts are inclined to allow leave to amend if it is possible for the plaintiff to cure the defects in the pleadings and state a valid legal claim. Courts should not dismiss the complaint unless it is beyond a doubt that there are no facts to support relief. Similarly, a court should not refuse leave to amend unless the same rigorous standard is met. This proposition is especially true for pro se plaintiffs, for whom the court should grant leave at least once if there is any indication of a valid claim." 3 Moore's Federal Practice, § 15.15 [3] (Matthew Bender 3d ed.).

Allegations of pro se litigants are held to a less stringent standard than pleadings drafted by lawyers, *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). **Court should provide opportunity to amend before dismissal for pro se plaintiff to**

develop case sufficiently to bring to light any merits of case, *Parker v. Fort Worth Police Dep't.*, 980 F.2d 1023, 1026 (5th Cir. 1993). **Before court may dismiss pro se litigant for failure to state claim, it must provide notice of deficiencies and opportunity to amend before dismissal**, *McGluckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992).

In determining whether to grant leave to amend, a court should consider whether any facts are alleged that are sufficient to support a claim. **The appellate court will review the facts de novo to determine if dismissal without leave to amend is proper.**" 3 Moore's Federal Practice, § 15.15 [3] (Matthew Bender 3d ed.).

"**This rule provides liberal practice in allowance of amendments to formal pleadings.** *Coral v. Gonse*, 330 F.2d 997 (4th Cir. 1964). **In federal practice leave to amend is to be granted with liberality.** *Austin v. Reynolds Metals Co.*, 327 F.Supp. 1145 (E.D. Va. 1971)." "**Motion to dismiss held in abeyance so plaintiff could tender amended complaint.** *Miller v. Holiday Inns, Inc.*, 436 F.Supp. 460 (E.D. Va. 1977)."

"The movant's ability to obtain summary judgment will, however, vary according to the pleadings. Most obviously, a multiple count complaint makes it empirically less likely

that a movant can obtain summary judgment as to the entire case. In addition, a variety of claims makes a wider variety of information relevant to the disposition of the matter. As more information is relevant, a movant needs to do more to negate the possibility of a reasonable jury verdict in claimant's favor, making it harder for a movant to sustain its burden of showing entitlement to summary judgment, at least for the case as a whole. This phenomenon explains the historical reluctance of courts to grant summary judgment in large and complex cases, even though the summary judgment standard applicable is the same as that in ordinary litigation. [FN109] [FN109: Wider range of facts or competing inferences at issue makes summary judgment more difficult in large cases although same standards apply. See Herr, Haydock & Stempel, Motion Practice, § 16.1.11 at 443 (2d ed. 1991) (because large cases involve more sources of information, they present greater potential for factual disputes that may preclude summary judgment).] Moreover, in a case involving more claims, respondent has more opportunity to ferret out and focus on disputed factual matters that prevent resolution of the claim in the movant's favor. The claims and defenses at issue also determine what constitutes relevant evidence supporting or opposing summary judgment." 11 Moore's Federal Practice, § 56.30 [8] [a] [i] (Matthew Bender 3d ed. 1997) under section

entitled "[a] **Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions** [i] **Pleadings Frame Dispute and Consequently Affect Materiality**".

"Because the volume and nature of claims pleaded can affect summary judgment, a party seeking to avoid summary judgment may profit from amending its complaint to allege additional or different matter." 11 Moore's Federal Practice, § 56.30 [8] [a] [iii] (Matthew Bender 3d ed. 1997) under section entitled "[a] Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions [iii] **Motions to Amend Pleadings May Narrow or Broaden Factual and Legal Questions and Can Therefore Affect Summary Judgment**". Petitioner's original unverified pleading in PJM-96-2913 only recited the facts of a half a dozen of petitioner's individual equal employment opportunity complaints. Petitioner's proposed **amended verified pleading** in PJM-96-2913 recites the facts of about four dozen of petitioner's individual equal employment opportunity complaints, and contains additional claims, including rather reluctantly a claim for a be fired or quit

constructive discharge. However, if a Court simply refuses to even allow petitioner to file or to have docketed or to consider an amended complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means of the pleadings determining the relevance and materiality in litigation, for the contents of the pleadings to influence summary judgment decisions, and for the amended pleadings to broaden the factual and legal questions which can affect summary judgment, which may unfortunately be the real intent behind the order in the first place.

Verified pleadings "may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (**verified complaint treated as equivalent of an affidavit on a motion for summary judgment**; conclusory allegations would be ignored on summary judgment, but factual averments could be considered; complaint could be considered to the extent that it complied with the standards of Rule 56(e).) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings. However, if a Court

simply refuses to even allow petitioner to file or have docketed a verified complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means for an "equivalent to a supporting or opposing affidavit", which may unfortunately be the real intent behind the order in the first place.

Respectfully Submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX HH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*October 06, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 86**
	*
Defendants	*October 06, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION
OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION
ACCORDING TO F.R.C.P. RULE 65,
OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT
ACCORDING TO F.R.C.P. RULE 57,
OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT
ACCORDING TO F.R.C.P. RULE 56,
ON THE NATIONAL INSTITUTES OF HEALTH (NIH)
FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM

(FEORP)

AND THE NATIONAL INSTITUTES OF HEALTH (NIH) AFFIRMATIVE EMPLOYMENT PROGRAM (AEP) AND THE UNITED STATES FEDERAL GOVERNMENT'S FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) and the National Institutes of Health (NIH) Affirmative Employment Program (AEP) and the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP).

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of any of the National Institutes of Health so called affirmative action programs for minorities or females or

hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), and b) that the means employed by any of the National Institutes of Health (NIH) so called affirmative action programs for minorities or females or hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), are not narrowly tailored measures, and Plaintiff further seeks to enjoin and prohibit the use of the National Institutes of Health (NIH) so called affirmative action programs based on race or gender or national origin on any of the elements of the National Institutes of Health (NIH) so called affirmative action programs or NIH FEORP or NIH AEP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), which are specifically mentioned in PJM-96-2913, including but not limited to: Violations of the Requirement to Rank or Group Candidates and Refer Only a Reasonable Number (Normally 3 to 5) of the Best Qualified Candidates for Selection Because of the NIH FEORP or the NIH

AEP; the Different Method of Selection under the NIH FEORP or the NIH AEP of Qualifications Review Board Members Who Evaluate and Refer Eligible Candidates for Selection; the NIH FEORP or the NIH AEP Requirement for the Justification and Approval of the Selection of the Best Qualified White Male, but not for the Selection of Even Minimally Qualified Minorities and Females; the Mandatory Classification of Candidates by Race and Gender under the NIH FEORP or NIH AEP; the Federal Government Officials' Responsibilities to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females and Hispanics under the NIH FEORP or the NIH AEP, and their Dual Mutually Exclusive Functions to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Equal Employment Opportunity Commission's (EEOC's) Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the NIH FEORP or NIH AEP; the Failure of the NIH to Seriously Consider, Interview, or Select White Males for the NIH FEORP or NIH AEP Designated Job Openings; and the Exclusion of Relevant Qualifications from Consideration for NIH

FEORP or NIH AEP Designated Job Openings.

Plaintiff hereby moves for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for a declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for a partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the United States federal government's Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Plaintiff further seeks to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), programs of the United States federal government, including but not limited to: The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c); the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender and National Origin,

including but not limited to, Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women, Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, and Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force; the Equal Employment Opportunity Commission's Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the Federal Equal Opportunity Recruitment Program FEORP and the Affirmative Employment Program AEP; the Failure of the United States Government to Seriously Consider, Interview, or Select White Males for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; the Exclusion of Relevant Qualifications from Consideration for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; and the Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program FEORP.

The reasons for this motion are set forth in the accompanying memorandum.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * *	Date Stamp:
	*Filed
FRANK PAUL LUKACS	*US District Court
	*District of Maryland
Plaintiff	*October 06, 1998
	*Clerk's Office
v.	*
	***Docketed Paper**
DONNA E. SHALALA	***Numbered 86**
	*
Defendants	*October 06, 1998
	*Civil Action #
* * * * * * * * * * * *	PJM-96-2913

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE MOTION FOR A PERMANENT INJUNCTION ACCORDING TO F.R.C.P. RULE 65, OR IN THE ALTERNATIVE MOTION FOR A DECLARATORY JUDGMENT ACCORDING TO F.R.C.P. RULE 57, OR IN THE ALTERNATIVE MOTION FOR A PARTIAL SUMMARY JUDGMENT ACCORDING TO F.R.C.P. RULE 56, ON THE NATIONAL INSTITUTES OF HEALTH (NIH)

FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)
AND THE NATIONAL INSTITUTES OF HEALTH (NIH)
AFFIRMATIVE EMPLOYMENT PROGRAM (AEP)
AND THE UNITED STATES FEDERAL GOVERNMENT'S
FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM (FEORP)

PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

"The Supreme Court has said that the traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance, the plaintiff will suffer irreparable injury and also that the plaintiff is likely to prevail on the merits. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975). See also *In re Y & A Group Sec. Litig.*, 38 F.3d 380 (8th Cir. 1994). ... ***Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) (where constitutional rights have been infringed upon, the threat of irreparable injury and disservice to the public interest is clear).**" Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 696, §65.3. ...

"After providing that in all non-jury actions tried upon the facts, the court shall

find the facts specially and state separately its conclusions of law thereon, Rule 52(a) goes on to state that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". And the appellate court is normally justified in vacating the order and remanding for fuller explanation where the trial judge's findings and conclusions lack specificity. *Schmidt v. Lessard*, 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (citing Moore's)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 700, §65.7. ...

"The district court must set forth findings of fact and conclusions of law in granting or denying interlocutory injunctions. Rule 52 specifically requires that findings be made in these cases. The United States Supreme Court has described the need for fair compliance with the findings requirement in cases seeking interlocutory injunction as being of "the highest importance". [FN15] ([FN15] Highest importance. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S. Ct. 517, 84 L. Ed. 774 (1940).) As with findings in non-jury trials, the findings must be sufficient to allow the appellate court the opportunity to conduct a meaningful review

(see § 52.15)." 9 Moore's Federal Practice, § 52.10[2][a][i] (Matthew Bender 3d ed.) under section entitled "[2] Injunctions [a] Interlocutory Injunctions [i] Findings Usually Required." ...

"The purpose of injunctive relief is to prevent future harm. ... Future violations. See *United States v. Oregon Med. Soc'y*, 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952) (function of injunctive relief is to forestall future violations. See *United States v. Barr Lab., Inc.*, 812 F. Supp. 458, 487-488 (D.N.J. 1993) (injunctive relief used to prevent future harm." 13 Moore's Federal Practice, § 65.02 [2] (Matthew Bender 3d ed.). ...

"An injunction may be granted without a showing of past wrongs. ... Showing of past wrongs not required. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953) (party moving for injunctive relief need not show past wrongs). ... Injunctive relief proper prior to occurrence of harm. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1983-1984, 128 L. Ed. 2d 811 (1994) (plaintiff was not required to wait until after occurrence of "tragic event" (assault) in order to obtain injunctive relief)." 13 Moore's Federal Practice, § 65.02 [2] (Matthew Bender 3d ed.). ...

"An adequate remedy at law may be deemed unavailable if legal redress may be obtained only by commencement of multiple actions, such as when the defendants repeatedly commits allegedly harmful acts. Further a plaintiff may demonstrate a lack of an adequate remedy at law by showing that the awarding of damages by an alternative remedy may be insufficiently compensatory in light of the harm caused by defendant's conduct. ... Multiple actions necessary for legal remedy. See *Lee v. Bickell*, 292 U.S. 415, 421, 54 S. Ct. 727, 78 L. Ed. 1337 (1934) (necessity for multiplicity of actions for legal remedy was sufficient to uphold injunction); *Ecolab, Inc. v. Paolo*, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) ("If plaintiff can receive legal relief only through a multiplicity of lawsuits, plaintiff has suffered irreparable harm sufficient to warrant a preliminary injunction".). ... Repeated harmful actions. See, e.g., *Northeast Women's Ctr., Inc., v. McMonagle*, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) ("The legal remedy is inadequate if the plaintiff's injury is a continuing one, where the last available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew."). ... Potential damage award insufficient to be deemed adequate remedy at law. See *Peabody Holding Co. v. Costain Group PLC*, 813 F. Supp.

1402, 1421 (E.D. Mo. 1993) ("Improper conduct for which monetary remedies cannot provide adequate compensation is sufficient to establish [irreparable] harm".)." 13 Moore's Federal Practice, § 65.02 [2] (Matthew Bender 3d ed.). ...

The preceding cases are applicable and dispositive, for in fact, plaintiff of necessity has had to commence multiple actions which have been necessary for an appropriate legal remedy, for in fact the injury is a continuing one and there have been repeated harmful actions, and in fact the potential damage award is totally insufficient to be deemed an adequate remedy at law, since every time there is a vacancy and a job vacancy announcement in the federal government, and every time that there is recruitment for a federal government job, and every time that plaintiff is searching for a federal government job, and every time that plaintiff has in fact applied for a federal government job, and every time that plaintiff will apply for federal government employment, leading all the way up to every time there is actually a selection for a federal government job, and in fact even every time that there has been a job vacancy announcement and there is not selection from that job vacancy announcement for a federal government job, plaintiff is in effect and in fact being discriminated against because of his race and sex and national

origin and age. This is precisely why plaintiff has in fact been forced to already commence multiple actions in this federal court, and why plaintiff will in fact be forced to commence even more multiple actions in this federal court. In addition, the rather artificially limited and minimal monetary amounts presently recoverable under Title VII are insufficient and inadequate and thus demonstrate a lack of an adequate remedy at law, besides which this is a violation of the Constitution of the United States itself, and not just a statutory violation of Title VII. ...

"***Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169-170 (11th Cir. 1988) (district court abused its discretion in denying motion for preliminary injunction without evidentiary hearing because, in Title VII (42 U.S.C. §§ 2000e-2000e-17) actions, irreparable harm is presumed** and hearing would have determined whether defendant could have overcome presumption and whether plaintiff had met other requirements for injunction)." 13 Moore's Federal Practice, § 65.21 [1] (Matthew Bender 3d ed.). ...

"Presumption of irreparable injury in other civil rights cases. ... *Able v. United States*, 847 F. Supp. 1038, 1043 (E.D.N.Y. 1994) ("[P]ossible violation of constitutional

rights [under Fifth and First Amendments] constitutes irreparable harm."). *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) ("Victims of discrimination suffer irreparable injury, regardless of pecuniary damage."). *Gresham v. Windbrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.), cert. denied, 469 U.S. 882 (1984) (housing discrimination "almost always results in irreparable injury"). 13 Moore's Federal Practice, § 65.22 [4] (Matthew Bender 3d ed.). ...

"Although the court in a civil rights action will more closely scrutinize the facts before deciding whether a preliminary injunction is the appropriate remedy, an injunction will be granted when necessary to protect and preserve basic civil rights. Likelihood of success on the underlying civil rights claim must be established, but will usually be found when the defendant's proposed actions will clearly violate constitutionally protected rights. ... Injunction will be granted when necessary to protect basic civil rights. See *Clemens v. Board of Educ.*, 228 F.2d 853, 857 (6th Cir.), cert. denied, 350 U.S. 1006 (1956) (injunction will issue to protect and preserve basic civil rights)." 13 Moore's Federal Practice, § 65.22 [4] (Matthew Bender 3d ed.). ...

The following quotations are from *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991), which is also favorable to plaintiff:

"The standard for preliminary injunctions is established in this Circuit by *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). *Blackwelder* clarified that a hardship balancing test applies to determine the granting or denial of a preliminary injunction. See *L.J. By and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989). Four factors must be considered: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. *Massinga*, 838 F.2d at 120. The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, see *Merrill Lynch*, 756 F.2d at 1054, a preliminary injunction will be granted if "the plaintiff has raised serious questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation". *Blackwelder*, 550 F.2d at 195; see *Todd by Todd*

v. Sorrell, 841 F.2d 87, 88 n.2 (4th Cir. 1988). As the balance tips away from the plaintiff, a stronger showing on the merits is required. See *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980)." ...

As per the cited relevant cases, plaintiff has more than adequately met the irreparable injury criteria for the granting of an injunction dealing with the violation of his basic civil rights and the violation of his constitutional rights. The injury which is being suffered by plaintiff because of the violation of his basic civil rights and the violation of his constitutional rights outweighs any harm which granting the injunctive relief would inflict on the defendants, especially since the effect of the preliminary injunction would be merely to prevent future illegal and unconstitutional conduct by defendants in which they are presently engaging which cannot even be considered as a harm being inflicted on the defendants in the first place. Since all of the relevant recent civil rights cases have basically stated that so called affirmative action programs are discriminatory and illegal and unconstitutional, the relevant recent case law itself is what demonstrates and exhibits plaintiff's likelihood of success on the merits relating to the issues being presented in the preliminary injunction more than anything else. The public interest will not

be adversely affected by the granting of the injunction, for the enjoining of discriminatory and illegal and unconstitutional behavior is in itself ultimately in the public interest, and cannot possibly be construed as adversely affecting the public interest.

DECLARATORY JUDGMENT

PARTIAL SUMMARY JUDGMENT

STATUTES, REGULATIONS, RULES, AND PROCEDURES OF FEORP AND AEP

Exclusion of relevant qualifications from consideration for Federal Equal Opportunity Recruitment Program (FEORP) designated job openings to greatly increase the probability of a minority or woman to be evaluated as being highly qualified and to be selected for the openings, and to correspondingly greatly decrease the probability of a white male, especially one over forty years of age and of Hungarian origin, to be evaluated as being highly qualified and to be selected for the openings, is discriminatory. ...

Failure of NIH OEO under Naomi Churchill, Diane Armstrong, and Linda Morris to comply with mandatory 30 day processing time for informal EEO complaint is a violation of 29 C.F.R. §1614. ...

Failure of DHHS and NIH OEO under Naomi Churchill, Diane Armstrong, and Linda Morris to comply with mandatory 180 days for completion of investigation of formal equal employment opportunity complaint is a violation of 29 C. F. R. §1614. ...

Failure of defendants to seriously consider, interview, or select plaintiff for Federal Equal Opportunity Recruitment Program (FEORP) designated job openings and benefits was discriminatory. ...

Preferences and favoritism for minorities and women under the Federal Equal Opportunity Recruitment Program (FEORP) and the Affirmative Employment Program (AEP), and the creation of barriers to the selection, hiring, and promotion of white males, especially those most qualified and over forty years of age, are discriminatory. ...

The Equal Employment Opportunity Commission's responsibilities under Gilbert Casellas to establish and maintain discriminatory affirmative action programs for minorities and females, and the EEOC's dual mutually exclusive function to ensure real equal employment opportunity regardless of race or sex or national origin or age, represent a conflict of interest, have the appearance of partiality, prejudice, and bias, and are discriminatory against caucasian

males. ...

Federal government officials' responsibilities, such as Harold Varmus, Ruth Kirschstein, Bernadine Healy, Richard Klausner, Edward Sondik, Philip Amoruso, Alan Rabson, Maxine Richardson, Sandra Thomas, Marianne Wagner, and Susan Cory to establish and maintain discriminatory affirmative action programs for minorities and females, under the pretext of "diversity", and their dual mutually exclusive functions to ensure real equal employment opportunity regardless of race or sex or national origin or age, represent a conflict of interest, have the appearance of partiality, prejudice, and bias, and are discriminatory against caucasian males. ...

Federal Equal Opportunity Recruitment Program (FEORP) and Affirmative Employment Program (AEP) requirements for the justification and approval of the selection of the best qualified white male, but not for the selection of even minimally qualified minorities and females, and the mandatory classification of candidates by race and gender, are discriminatory. ...

Selection by the FEORP Operations Coordinator under the Federal Equal Opportunity Recruitment Program (FEORP) of qualifications review board members, who

evaluate and refer eligible candidates for selection, who are themselves minorities and women, and who would promote the selection of minorities and women and the nonselection of white males such as plaintiff, is discriminatory. ...

Violation of the requirement to rank or group candidates and refer only a reasonable number, normally 3 to 5, of the best qualified candidates for selection, and in fact in two job vacancy announcements referring a total of sixty two and sixty nine supposedly "best qualified" candidates to the selecting official, in order to give preference and favoritism to minimally qualified minorities and females, is discriminatory against the best qualified white males. ...

City of Richmond v. J.A. Croson Company

Relevant Cases Before Adarand

Adarand Constructors, Inc. v. Pena

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal

footing." General Contractors v. Jacksonville, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., at ---, 113 S.Ct., at 2303. ...

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." (Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2110-2112.) ...

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."(Adarand Constructors, Inc. v. Pena, 115 S.Ct. at 2112-2114.) ...

Relevant Case Law Since Adarand

CONCLUSION

Wherefore, Plaintiff hereby makes an application to the court for an order for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for an order for declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for an order for partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of any of the National Institutes of Health so called affirmative action programs for minorities or females or hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), and b) that the means employed by any of the National Institutes of Health (NIH) so called affirmative action programs for minorities or females or hispanics, including but not limited to, the National Institutes of Health (NIH) Federal Equal Opportunity Recruitment Program (FEORP) or the National Institutes of Health (NIH) Affirmative Employment Program (AEP), (hereinafter "NIH FEORP" or "NIH AEP" respectively), are not narrowly tailored

measures, and Plaintiff further seeks to enjoin and prohibit the use of the National Institutes of Health (NIH) so called affirmative action programs based on race or gender or national origin on any of the elements of the National Institutes of Health (NIH) so called affirmative action programs or NIH FEORP or NIH AEP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), which are specifically mentioned in PJM-96-2913, including but not limited to: Violations of the Requirement to Rank or Group Candidates and Refer Only a Reasonable Number (Normally 3 to 5) of the Best Qualified Candidates for Selection Because of the NIH FEORP or the NIH AEP; the Different Method of Selection under the NIH FEORP or the NIH AEP of Qualifications Review Board Members Who Evaluate and Refer Eligible Candidates for Selection; the NIH FEORP or the NIH AEP Requirement for the Justification and Approval of the Selection of the Best Qualified White Male, but not for the Selection of Even Minimally Qualified Minorities and Females; the Mandatory Classification of Candidates by Race and Gender under the NIH FEORP or NIH AEP; the Federal Government Officials' Responsibilities to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females and Hispanics under the NIH FEORP or the NIH AEP, and their Dual Mutually Exclusive Functions to Ensure Real Equal Employment

Opportunity Regardless of Race or Sex or National Origin or Age; the Equal Employment Opportunity Commission's (EEOC's) Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the NIH FEORP or NIH AEP; the Failure of the NIH to Seriously Consider, Interview, or Select White Males for the NIH FEORP or NIH AEP Designated Job Openings; and the Exclusion of Relevant Qualifications from Consideration for NIH FEORP or NIH AEP Designated Job Openings.

Wherefore, Plaintiff hereby makes an application to the court for an order for a preliminary injunction or in the alternative a permanent injunction according to F.R.C.P Rule 65, or in the alternative for an order for declaratory judgment according to F.R.C.P. Rule 57, or in the alternative for an order for partial summary judgment according to F.R.C.P. Rule 56, on the finding and conclusion that a) no compelling governmental interest exists which constitutionally protects or permits continuation of the federal government Federal Equal Opportunity Recruitment Program (FEORP) and b) that the means employed by FEORP are not narrowly tailored measures, and Plaintiff further seeks

to enjoin and prohibit the use of affirmative action based on race or gender or national origin on any of the elements of the so called affirmative action FEORP, (or negative action, or affirmative discrimination, or affirmative racism, or affirmative sexism), programs of the United States federal government, including but not limited to: The Legislation of 5 U.S.C. §7201 (d), the legislation of 5 U.S.C. §7201 (a), the legislation of 5 U.S.C. §7201 (c); the Regulations which Implement these Statutes, the Federal Equal Opportunity Recruitment Program FEORP, and the Affirmative Employment Program AEP; The Federal Equal Opportunity Recruitment Program Regulations on Underrepresentation and Classifications on the Basis of Race and Gender and National Origin, including but not limited to, Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to Qualifiable Minorities and Women, Elements of 5 C.F.R. §720.202 (a), Especially Those Referring to Women, and Elements of 5 C.F.R. §720.202 (e), Especially Those Referring to the Appropriate Labor Force; the Equal Employment Opportunity Commission's Responsibility to Establish and Maintain Discriminatory Affirmative Action Programs for Minorities and Females under FEORP, and the EEOC's Dual Mutually Exclusive Function to Ensure Real Equal Employment Opportunity Regardless of Race or Sex or National Origin or Age; the Preferences and Favoritism for Minorities and Women under the Federal Equal

Opportunity Recruitment Program FEORP and the Affirmative Employment Program AEP; the Failure of the United States Government to Seriously Consider, Interview, or Select White Males for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; the Exclusion of Relevant Qualifications from Consideration for Federal Equal Opportunity Recruitment Program FEORP Designated Job Openings; and the Office of Personnel Management Classification of Minorities by Race and National Origin Under the Federal Equal Opportunity Recruitment Program (FEORP).

APPENDIX JJ

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

	*Mailed
FRANK PAUL LUKACS	*09/09/98
	*
Plaintiff	*
	*Civil No.
v.	*PJM-97-379
	*
DONNA E. SHALALA, et al.	*Civil No.
	*PJM-97-3359
Defendants	*
	*Civil No.
* * * * * * * * * * * * * * *	*PJM-97-3495

ORDER

After a review of the various causes of action set forth in the complaints in the captained cases, the Court finds them to be duplicative of claims set forth by Pro Se Plaintiff Lukacs in two other cases before this Court. Civil Action No. PJM 96-2913 and Civil Action No. PJM-97-3483. Accordingly, it is this 31st day of August, 1998

ORDERED that Civil Action No. PJM-97-379, Civil Action No. PJM 97-3359, and Civil Action No. PJM-97-3495 are hereby DISMISSED; and it

is further

ORDERED that all pending Motions are hereby rendered MOOT.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX KK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*09/18/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-96-2913

* * * * * * * * * * * * * * *

ORDER

It is this 18th day of September, 1998, ORDERED that the time for the Defendants to answer, move, or otherwise plead to Plaintiff's Amended Complaint is extended through and including September 30, 1998.

Signature of William Connelly

_____

William Connelly
United States Magistrate Judge

cc: Judge Peter Messitte

APPENDIX LL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*09/17/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-97-3483

* * * * * * * * * * * * * * *

The Clerk received your "Motion for Leave" [and] "Amended Complaint" on 9/15/98; however, it is deficient in the areas checked below:

Pursuant to the verbage [sic] in attached Memorandum Opinion and Order (signed by Judge Peter J. Messitte, dated September 8, 1998), [and not filed until September 15, 1998], no further pleadings are to be filed.

The Clerk is directed to return the above paper(s) to counsel.

Very truly yours,

Signature of Peter J. Messitte, Jr.

_____

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX MM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*10/08/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-96-2913

* * * * * * * * * * * * * * *

PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE RULE 55

Plaintiff respectfully submits this motion for judgment by default according to Federal Rules of Civil Procedure Rule 55.

The reasons for this motion for judgment by default are set forth in the accompanying memorandum.

Respectfully submitted,

_____

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX NN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

* * * * * * * * * * * * * * *

FRANK PAUL LUKACS	*10/08/98
Plaintiff	*
v.	*Civil No.
DONNA E. SHALALA, et al.	*
Defendants	*PJM-96-2913

* * * * * * * * * * * * * * *

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE RULE 55

Plaintiff filed his "Amended Complaint" on September 08, 1998.

As the record of the clerk of the court itself demonstrates, the "Amended Complaint" was mailed to Earle B. Wilson, Assistant United States Attorney, 6625 United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201-2692, who was at that time representing and continues to the present to represent all of the defendants, including Donna E. Shalala, Secretary of the Department of Health and Human Services, as well as all of the individual defendants, on September 08, 1998.

Thus defendants had a total of thirteen

days from September 08, 1998 to "plead in response to an amended pleading", namely until September 21, 1998.

An order was entered in PJM-96-2913 by the United States Magistrate Judge which stated that "It is this 18th day of September, 1998, ORDERED that the time for the Defendants to answer, move, or otherwise plead to Plaintiff's Amended Complaint is extended through an including September 30, 1998".

As the record of the clerk of the court itself demonstrates, defendants have not answered, moved, or otherwise plead to Plaintiff's Amended Complaint by September 30, 1998.

The civil docket for case number PJM-96-2913 as of October 06, 1998 1:03 PM does not indicate that defendants have submitted anything in PJM-96-2913 since September 01, 1998. Defendants did not "plead in response to an amended pleading" by September 30, 1998. Thus the time for them to "plead in response to an amended pleading" had expired at the latest on September 30, 1998 without their having filed anything on their behalf, not even the filing of a motion for enlargement of time to respond to the complaint.

Thus although defendants only had until at the latest September 30, 1998 to "plead in response to an amended pleading", defendants did not even bother to file a motion for enlargement of time to respond to the complaint by September 30, 1998, and in fact

defendants to this date have not "plead in response to an amended pleading". ...

The reality of the situation is that in this case the defendants have now several times completely ignored the Federal Rules of Civil Procedure. The Department of Justice under this present administration is of course going to defend every and any element of so called affirmative action programs and every and any person who has done anything in furtherance of these so called affirmative action programs, no matter that what was done may have been illegal or unconstitutional. The defaulting defendants entire attitude to date has been that only if and when a federal court actually orders them to process and investigate Plaintiff's challenges to their discrimination and so called affirmative action programs and their retaliation and reprisal and harassment and creation of a hostile working environment and constructive discharge will they actually ever follow the mandatory rules and regulations. The defaulting defendants for years now have been acting in bad faith regarding the processing and investigation of Plaintiff's equal employment opportunity complaints and have been using dilatory tactics during the informal stage in front of the National Institutes of Health, during the formal stage in front of the Department of Health and Human Services, and during the appeal stage in front

of the Equal Employment Opportunity Commission, so it is not at all surprising that they would continue their same delaying and bad faith tactics now in federal court. The real question is whether or not the defaulting defendants underlying assumption is correct in that a federal court judge appointed by a pro affirmative action administration will let the defaulting defendants now continue to let them get away with their delaying and bad faith tactics. At the minimum the court's action will demonstrate Plaintiff's claim of the court's double standard regarding adherence to the relevant rules and regulations by a pro se plaintiff who readily admits that he is neither knowledgeable nor competent in their content much less their application, versus adherence to the relevant rules and regulations by the Department of Justice who are most knowledgeable and extremely competent in their misuse to their own benefit via dilatory tactics and bad faith which they have already previously demonstrated.

The reality of the matter is that a delaying tactic like this done in bad faith allows the so called affirmative action programs not only to continue unabated to the great prejudice of Plaintiff, but in fact allows these so called affirmative action programs to actually grow and become even more encompassing during this purposeful delay. At the rate of these delays, Plaintiff will be

long dead and buried before this court will ever even get around to addressing the issue, which is precisely the intent of the delay. ...

"The government has been severely criticized for abusing Rule 55(e) by its persistent failure to adhere to procedural requirements. ... See *Giampaoli v. Califano*, 628 F.2d 1190, 1195 n.12 (9th Cir. 1980) ("HEW has been almost singly responsible for the development of the jurisprudence of rule 55(e)"); *Santiago v. Secretary of Health, Education & Welfare*, 82 F.R.D. 164, 166 (D.P.R. 1979), rev'd on other grounds, 622 F.2d 1044 (1st Cir. 1980) ("the Secretary's systematic record of flagrant disobedience to judicial authority and obstinate abuse of this Court's leniency ...")." ...

Plaintiff would be greatly prejudiced if the federal government could so easily totally ignore not only plaintiff as they have been doing for years now, but the very rules and regulations and procedures for which they have continued for years now to express nothing but utter contempt and complete disrespect, while at the same time constantly threatening plaintiff that if plaintiff should ever miss any deadlines by even so much as one day that plaintiff's equal employment opportunity

complaints would be summarily dismissed permanently according to the very rules and regulations and procedures which they themselves have consistently for years now totally ignored and refused to follow. For this court and this federal court judge to allow this to happen in the name of justice would in itself be an injustice. ...

Here there has been no mistake, there has been no inadvertence, there has been no surprise, and there has been no excusable neglect. Quite the contrary, the defaulting defendants knew exactly what they were doing, and they were betting on being able to get away with filing nothing by September 30, 1998 with this court and this judge and that they would have to do nothing by September 30, 1998 and that there would be no consequences to their decision and of their intentional actions. The reality of the matter, and the inherent unfairness in this double standard, is that if plaintiff even though pro se had similarly missed the deadline date to plead or otherwise defend, plaintiff has no doubt that he would by now have in effect had his entire case thrown out of court by a quick judgment by default. ...

Apart from all of the previously cited case law, the reality of the situation is the

double standard which is being applied in this court, whereby any supposed procedural even local rule error of pro se plaintiff of which he is unaware is going to be fatal to plaintiff's cause of action since he is being held to a high rigorous standard, whereas any even purposeful violation of the very essence of the Federal Rules of Civil Procedure itself by the defendants' most legally experienced team of attorneys in this nation is going to be simply overlooked since they are being held to a less rigorous standard, which rather ironically is the essence of the discrimination inherent in so called affirmative action itself in that plaintiff as a white male is being held to a high rigorous standard whereas others of different race and gender at the same time are being held to a less rigorous standard. Both of these situations seem rather unfair to plaintiff.

...

Respectfully Submitted,

Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143
Telephone # (703) 481-0825
Plaintiff Pro Se

APPENDIX OO

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770

MEMORANDUM

TO: Frank Paul Lukacs

FROM: Judge Peter J. Messitte

RE: Lukacs v. Shalala

Civil No. PJM-96-2913

Date: October 13, 1998

The Court notes that Plaintiff has recently filed several pleadings, despite the Court's Order of June 30, 1997 directing the parties to file no further motions until the Court rules on Defendant's pending Motion to Dismiss or in the Alternative for Summary Judgment. **The Court will not consider these motions, docketed Papers 70, 71, 72, 74, 75, and 86.** These pleadings are all deemed DENIED without prejudice.

Any attempt of Plaintiff to file further pleadings until the Court's ruling on said Motion to Dismiss or in the Alternative for Summary Judgment will be made at the risk of sanctions.

The Clerk of this Court will be directed to not docket any more pleadings by Plaintiff until the Court's ruling on said motion.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Signature of Peter J. Messitte

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX PP

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*10/20/98
FRANK PAUL LUKACS	*USCAF Docket #
Plaintiff	*98-2537
v.	*
DONNA E. SHALALA, et al.	*District Court #
Defendants	*CA-96-2913-PJM
* * * * * * * * * * * * * * *	

IN RE FRANK PAUL LUKACS, PETITIONER
PETITION FOR A WRIT OF MANDAMUS

The district court on June 30, 1997 ordered "the parties are directed to file no further motions", on September 08, 1998 ordered that "neither party shall file further pleadings in this Court", and on October 13, 1998 ordered that "The Clerk of the Court will be directed to not docket any more pleadings". ...

A COURT HAS NO POWER TO PREVENT A PARTY FROM FILING PLEADINGS, MOTIONS, OR APPEALS AUTHORIZED BY THE FEDERAL RULES OF CIVIL PROCEDURE

"While a judge may require parties to confer before filing a motion, the judge may not, by failing to hold a conference, prevent

parties from filing. *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987)." *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 102, §7.3.

"A court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, at 652 (2d Cir. 1987).

A quick check in Westlaw will confirm that the above quotation from the Second Circuit Court of Appeals (thereby satisfying the situation that "the opinion is in conflict with another decision ... of another court of appeals and the conflict is not addressed in the opinion") has been quoted in over 200 separate cases and that this holding has been favorably cited in over 250 cases.

As an example, the first of over 250 citations in Westlaw regarding the above quote is from the United States Court of Appeals for the Federal Circuit decision in *In re Halliburton Co.*, 991 F.2d 810, 1993 WL 118929, (Fed.Cir.(Tex.), March 12, 1993), in which the district court, (very similar to the case before us),

"ordered that: no party in this case file anything further before this Court" ... "the filing of anything further in this Court, in

the absence of the exhaustion of such appellate scrutiny, will constitute an act of contempt, for which appropriate sanctions will issue."

The United States Court of Appeals for the Federal Circuit stated:

"In *Richardson [Greenshields Securities, Inc., v. Lau*, 825 F.2d 647 (2d Cir. 1987)], the Second Circuit stated that absent extraordinary circumstances, **"a [district] court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure."** *Richardson*, 825 F.2d at 652. We are in agreement with this principle. Accordingly, it is ordered that: Halliburton's petition is granted. The District Court's order is vacated and the district court is directed to allow the filing of motions authorized by the Federal Rules of Civil Procedure."

The following is a typical quotation from the 255 Westlaw citations, being from *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1256 (2nd Cir.(N.Y.) 1996):

"We have previously emphasized that **a district court "has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure."** *Richardson Greenshields Securities, Inc., v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987)."

In *Milltex Industries Corp. v. Jacquard Lace Co., Ltd.*, 55 F.3d 34, at 39 (2nd Cir.(N.Y.) 1995) the appellate court stated:

""**A court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure.**" *Richardson Greenshields Securities, Inc., v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987). Although it is within the judge's discretion to hold a pre-motion conference for the purpose of persuading a party not to file a perceived meritless motion, see id. ("We do not suggest that district judges cannot require a conference prior to the filing of motions as a means of managing litigation assigned to them."), the judge may not require that the court's permission be secured at such a conference before a party may file the motion."

In *Schoenberg v. Shaposlky Publishers, Inc.*, 971 F.2d 926, 936 (2nd Cir.(N.Y.) 1992), the appellate court stated:

"As we explained in *Richardson Greenshields Securities, Inc., v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987), "absent extraordinary circumstances ... **a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure**". Whenever a court directs a lawyer that he or she may not make a motion, it is in effect cutting the lines of communication between the

court and the litigants. This elimination of dialogue can result, as in the case here, in the multiplication of proceedings, especially when a party is seeking to raise a threshold issue."

"We may in appropriate circumstances treat an attempted appeal as a request for leave to file a petition for a writ of mandamus. [citations omitted] We believe that this is such an appropriate circumstance. ... Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, see *In re Martin-Trigona*, 737 F.2d 1254, 1261-1262 (2d Cir. 1984), or a failure to comply with sanctions imposed for such conduct, *Johl v. Johl*, 788 F.2d 75 (2d Cir. 1986) (per curium), a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure." *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, at 652 (2d Cir. 1987).

Plaintiff-Appellant has been in effect precluded from any meaningful action in the court proceedings or any meaningful "access to the court system", Moy v. United States, 906 F. 2d 467, 470 (9th Cir. 1990). Appellant has in effect had his "constitutional right of access to the courts", (Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct. 1491, 1994, 52 L.Ed. 2d 72 (1977)) and "his right to adequate, effective, and meaningful access", (Bounds,

430 at 822, 97 S.Ct. at 1495) to the courts curtailed and abridged. "It sanctions access restrictions that standing alone might or might not be objectionable but which "taken together [are] so burdensome as to deny the litigant meaningful access to the courts", In re Green, 669 F. 2d 779, at 786, (D.C.Cir. 1981) (per curiam); Abdullah v. Gatto, 773 F.2d 487, at 488 (2d Cir. 1985) (per curiam)", Procup v. Strickland, 792 F.2d 1069, at 1078 (11th Cir. 1986) (en banc, per curiam).

FEDERAL RULES OF CIVIL PROCEDURE RULE 42
When Actions Involving a Common Question of Law or Fact Are Pending Before the Court

FEDERAL RULES OF CIVIL PROCEDURE RULE 15
A Party May Amend the Party's Pleading Once as a Matter of Course At Any Time Before a Responsive Pleading Is Served

Contrary to the specific "Memorandum Opinion and Order" of the Court dated June 30, 1997 in PJM-96-2913, which for some reason or other was not even mailed until July 07, 1997, in which the United Stated District Judge stated that "the parties are directed to file no further motions", and the "Memorandum" from the United States District Judge dated July 23, 1997 which again reiterated that "the Court, among other things, directed the parties to file no further motions", the

Defendants through their representatives the Department of Justice nevertheless filed a motion on September 01, 1998, (See Exhibit "26" of the attached declaration) which motion by the way was even granted by the Court (See Exhibit "26" of the attached declaration). ...

Plaintiff to date has not filed any motions in PJM-96-2913. Plaintiff instead of directly challenging the authority of the court directing the parties to file no further motions by actually filing a motion merely appealed the order of the United States District Judge, to use the words of the United States Court of Appeals for the Fourth Circuit "directing the parties to file no further motions", to the United States Court of Appeals for the Fourth Circuit. ...

The Fourth Circuit dismissed "the appeal of the remaining orders for lack of jurisdiction because the orders are not appealable" and "the orders here appealed are neither final orders nor appealable interlocutory or collateral orders". Plaintiff filed a petition for rehearing and suggestion for rehearing en banc, which were denied. Plaintiff filed a motion for a stay of the mandate which was denied without comment. Plaintiff timely filed a petition for a writ of certiorari to the Supreme Court of the United States. ...

On April 03, 1998 plaintiff filed a petition with the United States Court of Appeals for the Fourth Circuit for a writ of

mandamus making an application to the court for an order that the district court be directed to allow the filing of motions. ... Plaintiff's motion for rehearing and suggestion for rehearing en banc were denied on August 10, 1998, paving the way for a conflict among the circuits, with the Fourth Circuit Court of Appeals all alone on one side and every other Circuit Courts of Appeal to have actually considered the issue on the other side. ...

If plaintiff had knowingly purposefully violated the order and filed a motion, plaintiff would have been thrown out of court and thrown into jail. However, if defendants can now with complete impunity violate the direct order of the district court judge not to file any motions, then perhaps in all fairness plaintiff should now be permitted to also file motions. ...

The reality of the situation is the double standard which is being applied in this court, whereby any supposed procedural even local rule error of pro se plaintiff of which he is unaware is going to be fatal to plaintiff's cause of action since he is being held to a high rigorous standard, whereas any even purposeful violation of the very essence of the Federal Rules of Civil Procedure or even a direct violation of an order of the court by the defendants' most legally experienced team of attorneys in this nation is going to be simply overlooked since they

are being held to a less rigorous standard, which rather ironically is the essence of the discrimination inherent in so called affirmative action itself in that plaintiff as a white male is being held to a high rigorous standard whereas others of different race and gender at the same time are being held to a less rigorous standard. Both of these situations seem rather unfair to plaintiff." ...

The preceding examples however were just a prelude of what was to come. In a "memorandum opinion and order" of the United States District Court for the District of Maryland which was supposedly dated September 08, 1998, but which was not actually mailed from the office of the U.S. District Judge's office until September 14, 1998, PM no less, the Court in PJM-97-3483 ordered that "neither party shall file further pleadings in this Court".

FEDERAL RULES OF CIVIL PROCEDURE RULE 15
Leave Shall Be Freely Given When Justice So Requires

PLAINTIFF'S RIGHT TO FILE PLEADINGS
According to the Federal Rules of Civil Procedure and According to 29 C.F.R. § 1614

For the court to state that "neither party shall file further pleadings in this Court" deprives plaintiff-appellant of his

right according to 29 C.F.R. § 1614 "to file a civil action in an appropriate United States District Court" "within 90 days of receipt of the final decision on an individual complaint" or "within 90 days of receipt of the Commission's final decision on an appeal", on any presently pending EEO complaint of plaintiff-appellant, which this district court simply has no power to do. ...

FEDERAL RULES OF CIVIL PROCEDURE RULE 55 Failed to Plead or Otherwise Defend as Provided by These Rules

The district court judge is employing a double standard and is not being fair or just and does not even have the appearance of impartiality. As plaintiff-appellant has stated repeatedly:

"Thus defendants have constantly purposefully missed their long 30 day and 180 day deadline dates, and yet would turn around and nevertheless threaten plaintiff with "dismissal of the complaint due to untimely filing" if he ever even once missed his deadline date of "fifteen calendar days from the date of receipt". So what is going to happen now when defendants have been constantly missing their deadline dates in federal court, and now even directly violating an order of the court? Will defendants be held by this court to the same standard as plaintiff has been held by this court all this

time?

Sounds like a double standard to plaintiff, both by the agency, and by this court. Plaintiff pro se is expected to abide by local rules of which he is unaware, but defendants even if represented by none other than the Department of Justice do not feel that they have to abide by even the Federal Rules of Civil Procedure or direct orders of the federal district court judge. It seems that only plaintiff has to follow even the applicable local rules and regulations, but that defendants do not have to even follow the applicable federal rules and regulations. But then again since defendants feel that they can with complete impunity totally purposefully ignore the mandatory provisions of 29 C.F.R. § 1614 regarding independent investigations and have the district court judge overlook this major infraction of the rules, then why should they not also feel that they can with complete impunity totally purposefully ignore the mandatory provisions of F.R.C.P. Rules regarding the time in which to plead or otherwise defend and have the district court judge repeatedly overlook this major infraction of the rules also. After all it is becoming rather obvious to everyone that it is only plaintiff who has to abide by all of the provisions of 29 C.F.R. § 1614 and the F.R.C.P. and even the local rules, and not defendants. No matter how you slice it, it seems totally unfair to plaintiff. Defendants

can demonstrate utter contempt for this court, not to mention they feel that they can even commit perjury in this court and easily get away with it, and it is plaintiff who is at the same time being admonished for voicing his dissatisfaction with this court's obvious partiality and use of a double standard. This is not fair.

PLAINTIFF'S MOTIONS FOR A PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE FOR A PERMANENT INJUNCTION ON THE NATIONAL INSTITUTES OF HEALTH SO CALLED FEORP AFFIRMATIVE ACTION PROGRAMS FOR MINORITIES AND FEMALES AND HISPANICS AND ON THE UNITED STATES FEDERAL GOVERNMENT'S SO CALLED FEORP AFFIRMATIVE ACTION PROGRAMS FOR MINORITIES AND FEMALES AND HISPANICS

The district court dismissed Plaintiff-Appellant's filed and docketed motion for a preliminary injunction or a permanent injunction on the National Institutes of Health's so called FEORP affirmative action programs for minorities and females and the United States federal government's so called FEORP affirmative action programs for minorities and females. However, the district court never addressed any of the required *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-196 (4th Cir. 1977) factors, or any factors for that matter, and violated Federal Rules of Civil Procedure Rule 52(a)

which specifically states that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action", and although the denial of the preliminary injunction is immediately appealable to the Fourth Circuit Court of Appeals, this court has even denied plaintiff-appellant the right to file a notice of appeal. ...

"After providing that in all non-jury actions tried upon the facts, the court shall find the facts specially and state separately its conclusions of law thereon, Rule 52(a) goes on to state that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". And the appellate court is normally justified in vacating the order and remanding for fuller explanation where the trial judge's findings and conclusions lack specificity. *Schmidt v. Lessard*, 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (citing Moore's)." *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 700, §65.7.

APPENDIX QQ

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2537

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Writ of Mandamus.
(CA-96-2913-PJM)

Submitted: November 17, 1998
Decided: November 30, 1998

Before WIDENER and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Petition denied by unpublished per curiam opinion.

Frank Paul Lukacs, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Frank Paul Lukacs filed a petition for a writ of mandamus requesting that this court order the district court: (1) vacate its orders in two of Lukacs' pending civil cases prohibiting the parties from filing further pleadings or motions until the court is able to dispose of motions currently pending; and (2) permit Lukacs to file pleadings, motions, affidavits, and appeals. In this mandamus petition, Lukacs failed to establish that he has a clear right to the relief sought and that no other remedy is adequate. See In re First Fed. Sav. & Loan Ass'n, 860 F.2d 135, 138 (4th Cir. 1988). Further, mandamus may not be used as a substitute for appeal. See In re United States Steelworkers, 595 F.2d 958, 960 (4th Cir. 1979). We therefore grant Lukacs' motion to file an attachment to his petition and deny Lukacs's petition for a writ of mandamus. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX RR

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*01/14/99
FRANK PAUL LUKACS	*USCAF Docket #
Plaintiff	*98-2537
v.	*
DONNA E. SHALALA, et al.	*District Court #
Defendants	*CA-96-2913-PJM
* * * * * * * * * * * * * * *	

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

The reality of the matter is that, according to the results of Petitioner's computer legal database search, every Court of Appeals to have thus far considered the issue, and there are over two hundred such cases, has reaffirmed that **absent extraordinary circumstances a court has no power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the Federal Rules of Civil Procedure (FRCP)**, and has therefore ordered that parties be permitted to file pleadings, motions, and appeals authorized by the FRCP, absent extraordinary circumstances, (which no one to date, not even the district court judge who initially signed the orders in question, has even remotely intimated that such extraordinary circumstances are anywhere near

the case here).

In fact the Court of Appeals for the Fourth Circuit in its very decision trying to justify its judgment, by its very silence on the topic, and even with more legal knowledge and expertise and capability at doing computer legal database searches, apparently could not find even one appellate court decision which did not come to the conclusion that **absent extraordinary circumstances a court has no power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the FRCP**.

The only thing that the Court of Appeals for the Fourth Circuit was able to come up with was that "In this mandamus petition, Lukacs failed to establish that he has a **clear right** to the relief sought and that no other remedy is adequate." But the reality of the matter is that every other Court of Appeals starts off with the basic proposition that all parties have a **clear right to the filing of all pleadings, motions, affidavits, and appeals authorized by the FRCP**, and that absent extraordinary circumstances a court has no power to prevent a party from filing pleadings, motions, affidavits, or appeals authorized by the FRCP. Since there are no substitutes for pleadings, motions, affidavits, or appeals authorized by the FRCP within the U S district courts, and since the U S district courts themselves have a monopoly on the federal judicial system, the reality of

the matter is that no other remedy is anywhere near or even remotely close to being adequate.

The Court of Appeals appears reticent at granting a writ of mandamus permitting Appellant to file further pleadings, motions, affidavits, and appeals, especially for an Appellant who is after all Pro Se, even though the district court has, in the words of the district court itself, since Appellant "in fact possesses a juris doctor degree" denied Appellant pro se status, and the district court has even in writing referred to Appellant as being only "technically pro se", and that "Plaintiff in this case merits no special solicitude" accorded "pro se litigants", and that Appellant was not going to be held to "less stringent standards than trained attorneys". Thus on the one hand the district court is holding Appellant to the "stringent standards of trained attorneys when preparing and filing their pleadings", but on the other hand the district court will not permit Appellant the **clear right** of trained attorneys to file further pleadings, motions, affidavits, and appeals authorized by the FRCP. The Fourth Circuit Court of Appeals on the other hand is clearly treating Appellant as Pro Se, starting with its "Order to Proceed on Informal Briefs", which states "Pursuant to Local Rule 34(b), this case shall be submitted on informal briefs", with Rule 34(b) being invoked "whenever any pro se appeal is filed". Thus Appellant loses every which way. The

district court will burden Appellant with the "stringent standards of trained attorneys when preparing and filing their pleadings", but will not grant Appellant the benefit of trained attorneys of being allowed to file pleadings, motions, affidavits, or appeals authorized by the FRCP. The Fourth Circuit Court of Appeals on the other hand will burden Appellant with the Pro Se designation and procedures, and therefore is hesitant to allow Appellant as a Pro Se the benefit of trained attorneys of being allowed to file pleadings, motions, affidavits, or appeals, even those specifically authorized by the FRCP. ...

The reality of the matter is that the issues presented by petitioner regarding the legality and constitutionality of the so called FEORP and AEP affirmative action programs for minorities and females and hispanics, and the corresponding negative action programs against white males, are not only legal ones but are also political issues presently dividing this nation, and even the Supreme Court itself. Thus it is only natural for a district court judge appointed by President Clinton, the most vocal supporter of these discriminatory action programs for minorities and females and hispanics, simply because it is in his political interests to side with the numerical majority of voters, to do everything procedurally, which misuse of procedure the district court judge has been employing via repeated sua sponte orders which

even the Department of Justice (DOJ) has not dared even suggest much less request, especially since petitioner has merely been following the specific directions and instructions of none other than Defendants regarding the substance of the district court judge's sua sponte orders, to make sure that petitioner loses and that Defendants win. Unfortunately, since this is petitioner pro se's first federal court complaint, although readily admitting that he is legally inexperienced for the task at hand to the point at times of sheer incompetence, he has been able to keep up with the DOJ, and in fact file motions for default judgment in four civil actions, petitioner pro se when pitted against the district court judge who is supposed to be detached and impartial but who has basically taken over the representation of the case for the Defendants, simply needs at the minimum to be able to file pleadings and motions and affidavits and appeals to defend himself, and establish the record for appeal, which this district court judge has simply refused for those very reasons to allow petitioner. The reality of the matter is that the district court judge refused to even allow petitioner to file much less seriously consider his motion to consolidate his five federal court civil actions "involving a common question of law or fact pending before the court", or for petitioner "to amend the party's pleading once as a matter of course at

any time before a responsive pleading is served" without a motion to amend, which motion of course petitioner was not permitted to file, or to file a motion for a preliminary injunction on the National Institutes of Health so called FEORP and AEP affirmative action programs for minorities and females, regarding which motions even if filed and docketed, in the words of the district court judge as late as October 13, 1998 "The Court will not consider these motions". ...

"The movant's ability to obtain summary judgment will, however, vary according to the pleadings. ... The claims and defenses at issue also determine what constitutes relevant evidence supporting or opposing summary judgment." 11 Moore's Federal Practice, § 56.30 [8] [a] [i] (Matthew Bender 3d ed. 1997) under section entitled "[a] **Because Pleadings Determine Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions** [i] **Pleadings Frame Dispute and Consequently Affect Materiality**".

"Because the volume and nature of claims pleaded can affect summary judgment, a party seeking to avoid summary judgment may profit from amending its complaint to allege additional or different matter." 11 *Moore's Federal Practice*, § 56.30 [8] [a] [iii] (Matthew Bender 3d ed. 1997) under section entitled "[a] Because Pleadings Determine

Relevance and Materiality in Litigation, Content of Pleadings and Conformity of Pleadings with Federal Rules of Civil Procedure May Influence Summary Judgment Decisions [iii] Motions to Amend Pleadings May Narrow or Broaden Factual and Legal Questions and Can Therefore Affect Summary Judgment".

Verified pleadings "may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991) (**verified complaint treated as equivalent of an affidavit on a motion for summary judgment**) See also *Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987)." Moore's Federal Practice, Federal Civil Rules 1997, by James Moore, published by Matthew Bender & Company, New York, page 617, §56.3 [6] Piercing the Pleadings; Effect of Verified and Unverified Pleadings.

Petitioner's original unverified pleading only recited the facts of a half a dozen of petitioner's individual equal employment opportunity complaints. Petitioner's proposed amended verified complaint recites the facts of about four dozen of petitioner's individual equal employment opportunity complaints, and contains additional claims, including rather reluctantly a claim for a be fired or quit constructive discharge. However, if a Court simply refuses to even allow petitioner to

file or to have docketed or to consider an amended complaint under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an effective means of the pleadings determining the relevance and materiality in litigation, for the contents of the pleadings to influence summary judgment decisions, and for the amended pleadings to broaden the factual and legal questions which can affect summary judgment, which may unfortunately be the real intent behind the order in the first place. ...

"If a party seeking summary judgment desires to use supporting affidavits, they should be served with the motion. And Rule 56(c) states that "[t]he adverse party prior to the day of hearing may serve opposing affidavits". This should be read in conjunction with Rule 6(d) which vests in the court the power to permit opposing affidavits "to be served at some other time". *Moore's Federal Practice, Federal Civil Rules 1997*, by James Moore, published by Matthew Bender & Company, New York, page 620, §56.3 [8] Notice; Time for Serving Affidavits.

However, if a Court simply refuses to even allow petitioner to file or have docketed a motion for leave to permit opposing affidavits "to be served at some other time" under an order which specifically threatens petitioner with sanctions, then petitioner is deprived of a meaningful opportunity and an

effective means to "serve opposing affidavits", which may unfortunately be the real intent behind the order in the first place.

APPENDIX SS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed February 10, 1998
No. 98-2537
CA-96-2913-PJM

In Re: FRANK PAUL LUKACS,
Petitioner.

On Petition for Rehearing
and Rehearing In Banc

Petitioner's petition for rehearing and rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc are denied.

For the Court,
/s/ Patricia S. Connor

CLERK

EXHIBIT TT

Docket Number 98-1821
Received May 11, 1999

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

In Re FRANK PAUL LUKACS,
Petitioner

On Petition for Writ of Mandamus
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF MANDAMUS

Frank Paul Lukacs, J.D., M.B.A.
P. O. Box 3143
McLean, Virginia 22103-3143
(703) 481-0825
Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. Under strict scrutiny, are the racial and gender and national origin classifications of the United States federal government's affirmative action and diversity programs for minorities and females and hispanics narrowly tailored measures that further compelling governmental interests, as per *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 132 L.Ed.2d 158, 63 USLW 4523.

II. Is it an abuse of discretion for a district court to order the parties to file no further pleadings or motions or affidavits or appeals authorized by the FRCP or Title VII, or to dismiss and refuse to consider filed and docketed pleadings, motions, affidavits, or appeals authorized by the FRCP or Title VII, including "amend[ing] the party's pleading once as a matter of course at any time before a responsive pleading is served", or motions to "amend the party's pleading by leave of court ... which shall be freely given when justice so requires", or motions for consolidation in "actions involving a common question of law or fact pending before the court", or motions for a preliminary or a permanent injunction on the racial and gender and national origin classifications of the United States federal government's so called affirmative action and diversity programs?

STATEMENT OF THE CASE

Petitioner from the date of his first Equal Employment Opportunity ("EEO") complaint at the National Institutes of Health ("NIH") in January of 1991, despite his having applied on an average of about once every month for advertised job vacancy announcements and benefits, and having timely filed over sixty separate EEO complaints "within 45 days of the date of the matter alleged to be discriminatory" as per 29 C.F.R. § 1614, on about fifty of which EEO complaints there was never any of the 29 C.F.R. § 1614 mandatory processing and investigation by the agency, (See Appendix D) has never once in all this time ever been selected for a so called affirmative action designated or diversity designated or Federal Equal Opportunity Recruitment Program ("FEORP") designated or Affirmative Employment Program ("AEP") designated job opening or benefit, which are in effect set aside for minorities and women and hispanics, at the NIH, at DHHS, or anywhere else in the entire United States federal government.

Petitioner is a member of a protected group, since petitioner is a white male. Petitioner has applied for numerous job vacancy announcements and benefits. Petitioner was qualified for these numerous job vacancy announcements and benefits.

Petitioner was rejected for these numerous job vacancy announcements and benefits. These positions or benefits either remained open and the employer continued to seek applicants, or else the positions or benefits were given to members outside of the protected group of white males. Petitioner was rejected for these positions or benefits under circumstances giving rise to an inference of unlawful discrimination, in particular all of the circumstances and elements of so called affirmative action programs, diversity programs, FEORP, and AEP.

Defendants have not articulated any, much less any legitimate, nondiscriminatory reason for fifty of the employment actions or denial of benefits. In those few cases where Defendants have articulated reasons for the employment actions or denial of benefits, defendants' reasons were a mere pretext for discrimination or simply not credible.

Petitioner maintains that because he is a caucasian male, and is over forty years of age and is a first generation legal immigrant of Hungarian ancestry, he has been limited to a few job series and benefits which are not affirmative action designated or diversity designated or FEORP designated or AEP designated. He has been forced to follow a career path that is outside of the "mainstream occupations", or highly populous occupations which tend to lead to higher level positions

in the agency.

Unfortunately, the filing of equal employment opportunity complaints of discrimination challenging the legality and constitutionality of such discrimination resulted in numerous instances of retaliation, reprisal, harassment, the creation of a hostile working environment, and as everyone had warned Petitioner aforehand, his eventual quit or be fired constructive discharge. ...

There are many individual elements of the United States federal government's and the National Institutes of Health's so called affirmative action or diversity programs for minorities and females and hispanics. (See Appendix M for a brief summary some of the ones of which Petitioner is aware, without the benefit of the investigations which should have been done by the agency according to 29 C.F.R. § 1614 on fifty of Petitioner's timely filed EEO complaints, {See Appendix D.}, and without the benefit of any discovery at all in federal court.) ...

We note that, contrary to respondent's suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents

the plaintiff from competing on an equal footing." *General Contractors v. Jacksonville*, 508 U.S. 655, ---, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at ---, 113 S.Ct., at 2303. (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2104-2106.)

Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny." (*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2110-2112.)

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."(*Adarand Constructors, Inc. v. Pena*, 115 S.Ct. at 2112-2114.)

APPENDIX UU

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

June 14, 1999

Mr. Frank Paul Lukacs
P. O. Box 3143
McLean, Virginia 22103-3143

Re: In Re Frank Paul Lukacs
No. 98-1821

Dear Mr. Lukacs:

The Court today entered the following order in the above entitled case:

The petition for a writ of mandamus is denied.

Sincerely,

William K. Suter, Clerk

APPENDIX VV

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*10/15/98
	*USCAF Docket #
FRANK PAUL LUKACS	*98-2382
	*98-2383
Plaintiff	*98-2384
	*98-2385
v.	*98-2386
	*
DONNA E. SHALALA, et al.	*CA-96-2913-PJM
	*CA-97-0379-PJM
Defendants	*CA-97-3359-PJM
	*CA-97-3483-PJM
* * * * * * * * * * * * * * *	*CA-97-3495-PJM

PLAINTIFF-APPELLANT'S INFORMAL BRIEF
PURSUANT TO LOCAL RULE 34(B)

... Even assuming that it is appropriate at this early stage, which plaintiff-appellant maintains that it is not, to merely examine and compare nothing but the bare titles of the claims themselves, apart from the different underlying facts and the different underlying factual allegations and the different underlying circumstances and the different underlying transactions and the different underlying series of connected transactions and the different underlying issues and the

different underlying causes of action, in PJM-96-2913, PJM-97-379, PJM-97-3359, PJM-97-3483, and PJM-97-3495 as of the date of the order of August 31, 1998, one can readily see that plaintiff only had claims of retaliation and reprisal, harassment, creation of a hostile working environment, intentional infliction of emotional distress, and constructive discharge in a motion to amend the complaint as of course since a responsive pleading had not been served in PJM-97-379, upon which motion the court had never acted, and in the original complaint and in the amended complaint of PJM-97-3495. The district court judge himself upon closer examination of the headings of the claims themselves after the order of August 31, 1998 realized and in writing on September 29, 1998 in effect admitted that plaintiff-appellant as of August 31, 1998 did not have any claims of retaliation and reprisal, harassment, creation of a hostile working environment, intentional infliction of emotional distress, and constructive discharge in PJM-97-3483 as the district court originally thought on August 31, 1998 upon a mere hasty and superficial and cursory review of the headings of the claims. ...

CLAIM PRECLUSION AND SUPPOSED DUPLICATION OF CLAIMS

The natural end result of the district court's irrational and illogical analysis is

that if plaintiff as a white male files a timely individual equal employment opportunity complaint within forty five days of an event on the basis of race and sex and national origin and age on his nonselection for an affirmative action designated job vacancy announcement with the position being filled by a less qualified minority or female, and then files a federal court complaint on the basis of race and sex and national origin and age on his nonselection for an affirmative action designated job vacancy announcement with the position being filled by a less qualified minority or female, then if months later plaintiff is again rejected for another affirmative action designated job vacancy announcement supposedly because of plaintiff's first federal court complaint plaintiff can never again file another individual equal employment opportunity complaint within forty five days of the event or another federal court complaint on the basis of race and sex and national origin and age on his nonselection for an affirmative action designated job vacancy announcement with the position being filled by a less qualified minority or female for supposedly "the court finds them duplicative of claims". That is entirely unsupported by any case law at all. **This is an attempt at claim preclusion before there has been any *valid final judgment on the merits* on any claim by any court in the first place. Even the "claim preclusion doctrine**

requires a *valid final judgment* that was rendered *on the merits*". 18 Moore's Federal Practice 3D, § 131.30 (Matthew Bender 3d ed.). Even where trial courts raise preclusion issues sua sponte, "the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied. *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (sua sponte application of preclusion not appropriate when court did not allow briefing on issue)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

...

29 C.F.R. § 1614 only talks in terms of "A complainant who has filed **an individual complaint**" and "is authorized under Title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court" and "within 90 days of receipt of the final decision on **an individual complaint**", for all of 29 C.F.R. § 1614 only talks about a complainant's "**individual complaints**", and not about a complainant's "individual claims".

Let us take a simplified hypothetical case, omitting a lot of details for our present purposes of illustration.

1 Suppose a white male plaintiff timely files an individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number one, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

2 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number two, on the denial of some benefits because he is a white male, with that same benefit however being given to minorities and females.

3 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number three, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

4 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as EEO number four,

on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

5 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number five, on perhaps his nonselection for an affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

6 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number six, on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females.

7 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number seven, on perhaps his nonselection for another affirmative action designated job vacancy announcement, with the position being filled by a less qualified minority or female.

8 Then a few months later further

suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number eight, on perhaps retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

9 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number nine, on perhaps additional retaliation and reprisal for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

10 Then a few months later further suppose that this same white male plaintiff timely files another individual equal employment opportunity complaint, namely within forty five days of the event, as per 29 C.F.R. § 1614, designated as number ten, on perhaps additional retaliation and reprisal and retaliatory constructive discharge for his having filed some equal employment opportunity complaints challenging the legality and constitutionality of so called affirmative action programs.

I Then a few months later, or even a few years later, plaintiff having met the procedural time requirements of 29 C.F.R. § 1614 on his fifth individual equal employment complaint, finally files a complaint in federal court, on his fifth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say September 17, 1997, with the civil action number being, let us say hypothetically PJM-96-2913. Plaintiff files his first complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on his nonselection for an affirmative action designated job vacancy announcement with the position having been filled by a less qualified minority or female, as well as challenging the constitutionality of the so called affirmative action statutes, regulations, rules, and procedures.

II Then a few months later, let us say on November 14, 1996, the agency issues a final decision on plaintiff's fourth individual equal employment opportunity complaint. Plaintiff now only has ninety days in which to file a complaint in federal court on his fourth equal employment opportunity complaint. Then later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's second individual equal employment opportunity complaint, let us say on November 19, 1996. Plaintiff, finally having exhausted all of his

administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. Then the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's third individual equal employment opportunity complaint, let us say on December 18, 1996. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court on his second equal employment opportunity complaint. With the first of the three ninety days almost having expired, plaintiff quickly files a complaint in federal court, on his second equal employment opportunity complaint, on his third equal employment opportunity complaint, and on his fourth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say February 06, 1997, with the civil action number being let us say hypothetically PJM-97-379. Plaintiff files his second complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of a benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379. However because of the procedural requirements for filing a civil action in an appropriate United States

District Court, plaintiff could not have filed the contents of PJM-97-379 until November 14, 1997 and had to have filed by February 14, 1997.

III Then a few months later, the Equal Employment Opportunity Commission finally gets around to making a decision on plaintiff's sixth individual equal employment opportunity complaint, let us say on July 08, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his sixth equal employment opportunity complaint, and let us for the sake of argument pick a date, any date, say October 03, 1997, with the civil action number being let us say hypothetically PJM-97-3359. Plaintiff files his third complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age on the denial of another benefit because he is a white male, with that same benefit however being given to minorities and females. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3359 until July 08, 1997 and had to have filed by October 08, 1997.

V Then a few months later, the Equal

Employment Opportunity Commission finally gets around to making a decision on plaintiff's eighth individual equal employment opportunity complaint and plaintiff's ninth individual equal employment opportunity complaints, let us say on July 16, 1997, with the agency adopting the EEOC decision as its own agency final decision on August 28, 1997. Plaintiff, finally having exhausted all of his administrative remedies, now only has ninety days in which to file a complaint in federal court. Plaintiff files a complaint in federal court, on his eighth and ninth and tenth equal employment opportunity complaints, and let us for the sake of argument pick a date, any date, say October 20, 1997, with the civil action number being let us say hypothetically PJM-97-3495. Plaintiff quickly files his fifth complaint in federal court with claims of discrimination on the basis of race, sex, national origin, and age as well as claims for retaliation and reprisal, with the retaliation and reprisal serving as additional evidence of plaintiff's claim of retaliatory constructive discharge. Plaintiff now has some common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until August 28, 1997, but had to have filed by November 28, 1997.

VI or III Then a few months later, after having been to the Equal Employment Opportunity Commission four times on plaintiff's first individual equal employment opportunity complaint, plaintiff has a window of opportunity to finally file a civil action in an appropriate United States District Court. Plaintiff in not wanting to file another federal court complaint instead chooses to amend his third federal court complaint PJM-97-3359 with the contents of his first equal employment opportunity complaint on let us say May 27, 1998. Plaintiff now has some additional common questions of law or fact in PJM-96-2913 and PJM-97-379 and PJM-97-3359 and PJM-97-3495. However because of the procedural requirements for filing a civil action in an appropriate United States District Court, plaintiff could not have filed the contents of PJM-97-3495 until February 1998.

VII Etcetera.

(Added to this scenario is the fact that plaintiff's first federal court complaint PJM-96-2913 was physically up on appeal at the Fourth Circuit Court of Appeals for most of this time, not to mention that the district court had ordered the parties not to file any motions, and later not to file any pleadings, thereby preventing plaintiff-appellant from amending or supplementing his first federal court complaint.)

Since there are several common questions

of law or fact plaintiff files a motion to consolidate. The court however without any explanation or comment at all decides that there are no common questions of law or fact and denies the motion to consolidate. The court instead dismisses plaintiff's PJM-97-379 and PJM-97-3359 and PJM-97-3495 federal court complaints, for although there are supposedly no common questions of law or fact, the court finds them to be duplicative of claims, whatever that means.

One of the problems with this totally incorrect analysis is that the court is totally ignoring the simple fact that it was the very limited time frames in which plaintiff had to file federal court complaints which resulted in the several federal court complaints in the first place, and which now prevents the district court, apart from the district court first employing the procedure of consolidation, from acting on plaintiff's federal court complaints all at once for the stated reasons.

So much for hypotheticals. Unfortunately, the preceding hypothetical is basically what really happened in the United States District Court for the District of Maryland in PJM-96-2913, PJM-97-379, PJM-97-3359, and PJM-97-3495.

So now what is really going on. Plaintiff posits that with plaintiff being a white male who is challenging so called affirmative action programs for minorities and

females, and with the district court judge having been appointed by President Clinton who is the biggest public supporter of so called affirmative action programs for minorities and females, the reality of the matter is that this court is obviously going to do everything it can to make sure that defendants do not lose and correspondingly that plaintiff does not win. Unfortunately, PJM-97-379 and PJM-97-3359 and PJM-97-3495 have really been "duplicative" but not "duplicative of claims", but "duplicative of declarations of entry of default by plaintiff against defendants" and "duplicative of motions for judgment by default by plaintiff against defendants". See Exhibit "23", which is a true and exact copy of an original and is a copy of three examples of Declarations for Entry of Default and Motions for Judgment by Default in PJM-97-379, PJM-97-3359, and PJM-97-3495, namely a declaration for entry of default in PJM-97-379, a motion for judgment by default in PJM-97-379, a declaration for entry of default in PJM-97-3359, a motion for judgment by default in PJM-97-3359, a declaration for entry of default in PJM-97-3495, and a motion for judgment by default in PJM-97-3495, which rather coincidentally are precisely the civil actions dismissed by the district court judge. It is so obvious that what the court is trying to do is simply dismiss PJM-97-379 and PJM-97-3359 and PJM-97-3495 just so that this court does not have to deal with the motions for

judgment by default by plaintiff against defendants. If there were really "duplicative claims" then why were not PJM-96-2913 and PJM-97-3483 dismissed instead? The answer is really very simple, in that these are not "duplicative of declarations of entry of default by plaintiff against defendants" and "duplicative of motions for judgment by default by plaintiff against defendants".

APPENDIX WW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*05/03/99
	*USCAF Docket #
FRANK PAUL LUKACS	*98-2383
	*98-2384
Plaintiff	*98-2386
	*
v.	*
	*
DONNA E. SHALALA, et al.	*
	*District #s
Defendants	*CA-97-0379-PJM
	*CA-97-3359-PJM
* * * * * * * * * * * * * * *	*CA-97-3495-PJM

PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

The misleading and **factually incorrect** appellate court opinion is in conflict with **every** decision of the Fourth Circuit as well as in conflict with **every** other decision of every other circuit regarding the requirement that **"there must have been a final judgment on the merits"** and that **"the prior action must have involved the same claim"** for the claim preclusion doctrine to apply, and is in conflict with every decision of every circuit whether using the **transactional approach** or

the **factual allegations approach** for claim preclusion. The misleading and **factually incorrect** appellate court opinion totally negates **42 USC § 2000e-16 (Title VII)** regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances which specifically states that "**Within 90 days of receipt of notice of final action** taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, **an employee or applicant for employment may file a civil action** as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." The misleading and **factually incorrect** appellate court opinion totally negates **29 C.F.R. § 1614** regarding the rights of federal government employees or applicants for filing civil actions for redress of grievances which specifically states that **"A complainant who has filed an individual complaint is authorized under Title, the ADEA, and the Rehabilitation Act to file a civil action in an appropriate United States District Court within 90 days of receipt of a final decision on an individual**

complaint if no appeal has been filed or within 90 days of receipt of the Commission's final decision on an appeal". ...

"According to 42 U.S.C. § 2000e-16 (Title VII) and 29 C.F.R. § 1614 plaintiff had every right to file "civil actions in an appropriate United States District Court" "within 90 days of receipt of the final decision on an individual complaint" and "within 90 days of receipt of the Commission's final decision on an appeal" of a "separate EEO complaint"."

Even if one does a cursory review, whether by the same transactional approach or by the same factual allegations approach, one can readily see that the four dozen separate and distinct Equal Employment Opportunity (EEO) complaints themselves, which are the basis of the claims, and which were initially filed within 30 or later 45 days of a discriminatory event, as per 42 U.S.C. §2000e-16 and 29 C.F.R. § 1614 are all different in the five civil actions.

With this decision, the district court and the appellate court have now declared that appellant did not have to exhaust his administrative remedies before filing a civil action in federal court, and that he did not have to file a civil action within 90 days of receipt of notice of final action, such as appellant did. ...

STATEMENT OF FACTS AND REASONS REGARDING THE PETITIONS

"Modern courts, in applying the *Cromwell* definition of the claim preclusion doctrine, have stated that at least three elements must be present before a claim will be barred as a result of a judgment in a prior action:

(1) **there must have been a final judgment on the merits**

(2) the prior action must have involved the same parties or their privies

(3) **the prior action must have involved the same claim.**

18 Moore's Federal Practice 3D, § 131.01 (Matthew Bender 3d ed.) under section entitled "Fundamental Principles of Claim Preclusion (Res Judicata) Doctrine - Doctrine Bars Claims Which Were Subject of Prior Judgment".

In addition, only those "**matters that arise from the same facts, occurrences, or transactions that were the basis of a prior action** may be within the scope of claim preclusion by that action". 18 Moore's Federal Practice 3D, § 131.10 [3] [c] (Matthew Bender 3d ed.). In addition it is only applicable if there is **"liberal joinder and amendment, and broad discovery rights, [and the] parties [have] had sufficient opportunity to present all of their related claims and defenses in the same action"**. 18 Moore's

Federal Practice 3D, § 131.11 [3] (Matthew Bender 3d ed.). ...

Since here there has not been any final judgment on the merits, since the prior action did not involve the same claims, since the elements of the same transactional test are not met, and since the elements of the same factual allegations test are not met, there can be no claim preclusion or duplication of claims.

"**Claim preclusion does not require a plaintiff to bring *every* claim that the plaintiff may have against a particular defendant in one action.** Such a requirement might well work against the very policy concerns of judicial efficiency and fairness to the parties that are the basis of the doctrine. Rather, only those claims that fall within the criteria set forth in the various approaches to the scope of claim preclusion described above must be brought in the same action. In *Doe v. Allied Signal, Inc.*, the Court of Appeals for the Seventh Circuit provided an example of **multiple claims arising within the same general fact pattern that were appropriately the subject of separate actions**. ... Example of multiple claims arising within same fact pattern but litigated in separate actions. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914 (7th Cir. 1993) (**plaintiff is not obligated to bring all claims together if they**

do not arise from same transaction). ... Identifying multiple claims within a single chain of events requires careful review of the facts and theories comprising the claims, but courts regularly find such multiple claims to exist. ... Courts regularly find multiple claims to exist. *2d Circuit* see *NLRB v. Union Techs. Corp.*, 796 F.2d 1254, 1259-1260 (2d Cir. 1983) (action by union was not barred even though it involved same rule and same contract provision as prior action; the court stated **"[T]he circumstances that several operative facts may be common to successive actions between the same parties does not mean that the claim asserted in the second is the same claim that was litigated in the first, and that litigation of the second is therefore precluded by the judgment in the first."**). *11th Circuit* *Wu v. Thomas*, 863 F.2d 1543, 1548-1549 (11th Cir. 1989) (action for retaliation not barred by prior action for civil rights violation, even though prior action included some testimony regarding retaliation)." 18 Moore's Federal Practice 3D, § 131.22 [2] (Matthew Bender 3d ed.) under section entitled "Claims Existing at Time of Prior Action But Outside Scope of Claim Preclusion".

Thus appellant was not required to, and in fact could not procedurally, bring every claim in one action. His multiple claims were appropriately the subject of separate actions.

"Many of the most difficult questions concerning the scope of claim preclusion arise in the context of **continuing wrongful conduct**. ... Whatever the cut-off date, **a continuing series of wrongful acts resulting in ongoing damage to the plaintiff will usually permit a series of actions, with each such action considered to be a separate claim unrestricted by the limitation of the claim preclusion doctrine**. ... **Continuing series of wrongful acts will usually permit series of actions.** *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) (**each time plaintiff is injured by defendant, cause of action accrues**); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (series of torts will give rise to several causes of action); see *Ohio-Sealy Mattress Mfg. Co., v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), cert. denied, 459 U.S. 943 (1982) (continuing antitrust violations); *United Food & Commercial v. City Foods, Inc.*, 878 F. Supp. 122, 123 (N.D.Ill. 1995) (**"[A] defendant's continuing course of conduct, even if related to conduct complained of in the earlier lawsuit, generally creates a separate cause of action."**) 18 Moore's Federal Practice 3D, § 131.23 [3] [c] (Matthew Bender 3d ed.) under section entitled "Continuing Wrongful Conduct by Defendant".

Most of the different, separate, and

distinct transactions and facts of appellant's four dozen different, separate, and distinct EEO complaints in his five civil actions can be characterized as "continuing wrongful conduct by defendant", or a "continuing series of wrongful acts permitting a series of actions", with each such action considered to be a separate claim unrestricted by the limitations of claim preclusion or duplication of claims. ...

"[T]rial courts (and appellate courts as well) may raise preclusion issues sua sponte. Of course, **the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion by the court. ... Parties must have reasonable notice and opportunity to be heard before claim preclusion is applied.** Compare *McClain v. Apodaca*, 793 F.2d 1031, 1032-1033 (9th Cir. 1986) (**sua sponte application of preclusion appropriate when district court heard evidence and gave both parties opportunity to address issue before ruling**) with *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir.), cert denied, 498 U.S. 999 (1990) (**sua sponte application of preclusion not appropriate when court did not allow briefing on issue**)." 18 Moore's Federal Practice 3D, § 131.51 (Matthew Bender 3d ed.).

As the record amply demonstrates, appellant did not have reasonable notice and

opportunity to be heard *before* the application of claim preclusion by the court, and in fact appellant did not have any notice at all or any opportunity at all to be heard *before* the application of claim preclusion by the court. Thus although the relevant cases state that "Parties must have reasonable notice and opportunity to be heard *before* claim preclusion is applied", here the district court was in a hurry to apply claim preclusion in a totally meaningless manner, totally ignoring all the relevant case law, especially since defendants were losing, and considering defendants supposed representatives the Department of Justice too incompetent to bring up, or meet the burden of proof on, claim preclusion or duplication of claims on their own. Then again the district court judge has been acting more like the real representative for defendants anyway, replacing the supposed representatives for defendants the Department of Justice, of whose professional legal competence the district court judge must have an even lower opinion than that of appellant. ...

"Even if all of the other prerequisites for claim preclusion are met, it will not be applied if the party against whom the prior judgment is asserted did not have a full and fair opportunity to litigate the claim in the

prior proceeding. Party against whom claim preclusion is asserted must have had full and fair opportunity to litigate claim in prior proceeding. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 & n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262, reh'g denied, 458 U.S. 1133 (1982) (**although prior holdings regarding requirement of full and fair opportunity to litigate were in context of issue preclusion, invocation of claim preclusion is subject to same requirement**). *7th Circuit Pirella v. Village of N. Aurora*, 935 F.2d 909, 913 (7th Cir.), cert. denied, 502 U.S. 983 (1991) (**"It is a well-established principle that no decision may constitute res judicata if the party against whom it is asserted has not had a full and fair opportunity to litigate his claims."**) *9th Circuit California v. FCC*, 905 F.2d 1217, 1245 (9th Cir. 1990) (**claim preclusion no bar to subsequent action when party was not given full and fair opportunity to litigate claim in prior proceeding**). *11th Circuit Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985) (**"It is well settled that res judicata cannot be applied against a party who did not have a full and fair opportunity to litigate an issue in a previous suit."**). 18 Moore's Federal Practice, § 131.41 [1] (Matthew Bender 3d ed. 1997) under section entitled **"Parties To Be Bound Must Have Had Full and Fair Opportunity**

to Litigate Prior Claim".

Here appellant never had any, much less a "full and fair, opportunity to litigate" any of the claims or any of the issues. Appellant was not even permitted to "amend the party's pleadings once as a matter of course at any time before a responsive pleading is served", with the district court judge ordering the clerk of the court that appellant's amended complaints not even be docketed and ordering that they instead be physically returned to appellant. ...

A simple broad claim by claim comparison for "Federal Sector Equal Employment Opportunity" (to use the words of 29 C.F.R. § 1614) civil actions is inappropriate, for the claims themselves are based upon the "transactions" or "factual allegations" of the complaint, which however because of 29 C.F.R. § 1614 is limited in that for each transaction or factual allegation or "matter alleged to be discriminatory", to use the controlling words of 29 C.F.R. § 1614, "an aggrieved person must initiate" a different, separate, and distinct Equal Employment Opportunity (EEO) complaint "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action", and thus in effect each different, separate, and distinct

EEO complaint within 45 days of the date of the matter alleged to be discriminatory is a different, separate, and distinct transaction and a different, separate, and distinct factual allegation for purposes of claim analysis.

In addition, since the pleadings of PJM-96-2913 and PJM-97-3483 only addressed about a dozen and a half different, separate, and distinct timely filed EEO complaints and therefore addressed only the "matters alleged to be discriminatory" or only the "transactions" or only the "factual allegations" in those different, separate, and distinct EEO complaints, the pleadings of PJM-97-379, PJM-97-3359, and PJM-97-3495 addressing an additional three dozen different, separate, and distinct timely filed EEO complaints containing different, separate, and distinct "claims" and different, separate, and distinct "matters alleged to be discriminatory" and different, separate, and distinct "transactions" and different, separate, and distinct "factual allegations", and which "could not have been raised in the prior litigation" and on which plaintiff-appellant did not have a "full and fair opportunity to litigate the claim in the prior proceeding" to boot, cannot be used for purposes of claim preclusion or issue preclusion or even duplication of claims.

APPENDIX XX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

* * * * * * * * * * * * * * *	*05/03/99
	*USCAF Docket #
FRANK PAUL LUKACS	*98-2383
	*98-2384
Plaintiff	*98-2386
	*
v.	*
	*
DONNA E. SHALALA, et al.	*
	*District #s
Defendants	*CA-97-0379-PJM
	*CA-97-3359-PJM
* * * * * * * * * * * * * * *	*CA-97-3495-PJM

ATTACHMENT TO PLAINTIFF-APPELLANT'S
PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

... It is rather apparent from the rather short opinion itself that **the Appellate Court**, in its very decision trying to justify its judgment, by its very silence on the topic, and even with more legal knowledge and expertise and capability at doing computer legal database searches, apparently **could not find even one appellate court decision, could not find even one district court case, either in the Fourth Circuit, or in any other circuit**

for that matter, in support of its completely erroneous decision. Not only that, every other decision from every other court regarding the matter has come to a totally different conclusion. ...

"For example, if anyone had actually even briefly compared even the broad titles of the claims themselves, without even actually comparing the underlying **transactions** or **factual allegations** of the claims themselves, they would have readily seen that PJM-96-2913 and PJM-97-3483 did not contain any claims for retaliatory constructive discharge or harassment or intentional infliction of emotional distress and physical injury. The dismissed civil action PJM-97-379 contained a motion for an amended complaint ("once as a matter of course at any time before a responsive pleading is served") containing claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury, and the dismissed civil action PJM-97-3495 contained claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury. Thus what really happened is that the district court dismissed the two civil actions containing the claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury and retained the two civil

actions which did not contain these claims. Then to boot, when appellant attempted to amend the pleadings according to FRCP Rule 15 (a) **"once as a matter of course at any time before a responsive pleading is served"** in PJM-96-2913 and PJM-97-3483 with claims for retaliatory constructive discharge and harassment and intentional infliction of emotional distress and physical injury, the district court judge ordered that the clerk of the district court not even docket these properly and appropriately filed amended complaints, and that these amended complaints be physically returned to appellant for the district court had no intention whatsoever of ever considering them. Then to add further insult to injury, when appellant attempted to file this exact same amended complaint as a separate civil action, the district court applied claim preclusion to these same claims which it simply refused to initially even permit in any amended complaint." ...

Even if one does a cursory review, whether by the same transactional approach or by the same factual allegations approach, one can readily see that the four dozen separate and district Equal employment Opportunity (EEO) complaints themselves, which are the basis of the claims, and which were initially filed within 30 or later 45 days of a discriminatory event, as per 42 U.S.C. §2000e-

16 and 29 C.F.R. § 1614 are different in the five civil actions.

As appellant has previously stated:

"For example civil action PJM-96-2913, which included about a half a dozen different separate and distinct EEO complaints, contained appellant's seventh and tenth EEO complaints timely filed on 10/15/91 and 01/27/92 respectively concerning job vacancy announcements for contract specialist positions CA-91-0159 and OD-91-0162 and designated by NIH as EEO # OEO-015-92 and EEO # OEO-077-92, as well as appellant's thirty first and thirty eighth EEO complaints timely filed on 05/08/94 and 11/26/94 concerning job vacancy announcements for the management cadre program positions and was designated by NIH as EEO # OEO-122-94 and EEO # OEO-030-95.

For example civil action PJM-97-379, which included about a dozen different separate and distinct EEO complaints, contained appellant's forty ninth and fifth sixth EEO complaints timely filed on 06/02/95 and 09/03/95 respectively concerning the job vacancy announcements for the National Cancer Institute (NCI) Administrative Career Development (ACD) program and was designated by NIH as EEO # OEO-135-95 and EEO # OEO-192-95.

For example civil action PJM-97-3359, which included about a dozen different separate and distinct EEO complaints, contained appellant's first and second EEO

complaints timely filed on 01/16/91 and 04/22/91 respectively concerning the job vacancy announcements for contract specialist positions OD-90-0395 and CA-91-0014 and designated by NIH as EEO # OEO-62-91 and EEO # OEO-155-91, and also contained appellant's fourth and fifth and eighth EEO complaints timely filed on 05/06/91 and 07/10/91 and 12/30/91 respectively concerning the job vacancy announcements for contract specialist positions OD-91-0063 and DK-91-0490 and was designated by NIH as EEO # OEO-153-91, EEO # OEO-156-91, and EEO # OEO-073-92.

For example civil action PJM-97-3495, which included about a dozen different separate and distinct EEO complaints, contained appellant's fifty seventh EEO complaint timely filed on 09/04/95 concerning the job vacancy announcements for the NIH Office of Technology Transfer's (OTT) technology licensing specialist positions and was designated by NIH as EEO # OEO-193-95."

...

"As a matter of practicality, the facts of a half dozen of appellant's EEO complaints in PJM-96-2913 and the facts of a dozen of appellant's EEO complaints in PJM-97-3483 could not possibly have been the same as the facts of a completely different three dozen of appellant's EEO complaints in PJM-97-379, PJM-97-3359, and PJM-97-3495, with all of them being timely filed in different time periods

over the course of several years within [initially 30 and later] "45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action" as per the relevant controlling 29 C.F.R. § 1614.

Furthermore, the Fourth Circuit follows either the "same transactional approach to the identity of claims question" in that it has to be the same "transaction, or series of connected transactions, out of which the action arose", or the "same factual allegations approach to the identity of claims question". Such is not the case here. Here the facts themselves are separated in time and space, for they have had to be of necessity, for according to the relevant rules and regulations of 42 USC § 2000e-16 and 29 C.F.R. § 1614, a different, separate, and distinct EEO complaint has be filed within 45 days of an event, and plaintiff can only go to federal court on different, separate, and distinct EEO complaints, and plaintiff cannot just go to federal court on so called broad claims or issues that are not contained within the transactions and fact situations occurring within 45 days immediately preceding the filing of the different, separate, and distinct EEO complaints. Thus the transactions and factual allegations themselves cannot possibly be the same for

different, separate, and distinct EEO complaints, and thus the claims cannot possibly be the same ones for they are based on different, separate, and distinct transactions and factual allegations. Plaintiff's civil pleadings PJM-96-2913 and PJM-97-3483 only contained the facts of about a dozen and a half different,separate, and distinct EEO complaints, and plaintiff's civil pleadings PJM-97-379, PJM-97-3359, and PJM-3495 contained the facts of each of about three dozen completely different, separate, and distinct EEO complaints." ...

"Since there were several common questions of law or fact plaintiff filed motions to consolidate in each of his federal court complaints. The court however without any explanation or comment at all decided that there were no common questions of law or fact and denied the motions to consolidate. The court instead dismissed plaintiff's PJM-97-379 and PJM-97-3359 and PJM-97-3495 federal court complaints, for although there were supposedly no common questions of law or fact, the court found them to be duplicative of claims, whatever that means."

"If there is anything such as "duplication of claims", whatever that means, then by definition, there must be "common questions of law or fact pending before the court", and if the court first determines that

there are no "common questions of law or fact pending before the court", then the court cannot later conclude that nevertheless there are "duplication of claims". This reasoning and logic is totally non sequitur. Either there are "common questions of law or fact pending before the court", or else there are not. The court cannot have it both ways." ...

"If PJM-97-379 and PJM-97-3359 and PJM-97-3495 have really been "duplicative", it is not "duplicative of claims", but **"duplicative of declarations of entry of default by plaintiff against defendants"** and **"duplicative of motions for judgment by default by plaintiff against defendants"**. See Exhibit "23", which is a true and exact copy of an original and is a copy of three examples of Declarations for Entry of Default and Motions for Judgment by Default in PJM-97-379, PJM-97-3359, and PJM-97-3495, namely a declaration for entry of default in PJM-97-379, a motion for judgment by default in PJM-97-379, a declaration for entry of default in PJM-97-3359, a motion for judgment by default in PJM-97-3359, a declaration for entry of default in PJM-97-3495, and a motion for judgment by default in PJM-97-3495, which rather coincidentally are precisely the civil actions dismissed by the district court judge. It is so obvious that what the court is trying to do is simply dismiss PJM-97-379 and PJM-97-3359

and PJM-97-3495 just so that this court does not have to deal with the motions for judgment by default by plaintiff against defendants. If there were really "duplicative claims" then why were not PJM-96-2913 and PJM-97-3483 dismissed instead? The answer is really very simple, in that PJM-96-2913 and PJM-97-3483 were not, unlike PJM-97-379 and PJM-97-3359 and PJM-97-3495, **"duplicative of declarations of entry of default by plaintiff against defendants"** and **"duplicative of motions for judgment by default by plaintiff against defendants"**."